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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

NO. [redacted] 34

J. R. FRANKEL, ET AL.,

Petitioners,

versus

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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HAUSER PRINTING CO., INC., NEW ORLEANS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, J. R. Frankel, et al.,[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on August 14, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 335 F (2d) 1004, and is printed as Appendix B to the petition of The United Gas Improve-

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[1] Petitioners are J. R. Frankel, R. R. Frankel, L. R. Frankel, Mae Frankel Shalett, H. T. Shalett, and the Estate of Maurice Frankel, successors to Berkshire Oil Company.

ment Company, et al., No. 671, October Term, 1964, for a writ of certiorari to review the same judgment.[2] The opinions of the Federal Power Commission are reported at 30 F.P.C. 283 and 30 F.P.C. 682, and are printed in the Joint Appendix filed in the Court of Appeals, copies of which have been deposited with this Court by the Solicitor General (R. 550-93, 607-17).

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 1964. On September 3, 1964, petitioners applied for rehearing. On September 21, 1964, rehearing was denied. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission may lawfully order retroactive reduction of filed rates, and imposition of refunds based on such reduction, by means of a condition attached to a certificate of public convenience and necessity issued to a producer under Section 7 of the Natural Gas Act?

2. Whether a certificate of public convenience and necessity may lawfully issue to a producer who is totally unable and unwilling to make the sale purportedly authorized?

3. Whether there is sufficient evidentiary or legal support for the findings and inferences of the Court of Appeals to the effect that it was up to the successful producers to seek interim protective relief from a former order of the Federal Power Commission, and that exten-

[2] The opinion is also copied as an appendix to the respective petitions in Nos. 678 and 714.

sions of time would have protected the producers and would have been granted if requested?

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, as amended (15 U.S.C. Sections 717-717w), are set forth in Appendix A, *infra*, pp. 1a, et seq.

STATEMENT

On August 30, 1957, petitioners' predecessors[3] applied (R. 5-11) to the Commission for a certificate covering a sale to Transcontinental Gas Pipe Line Corporation from a South Louisiana field under a gas sales contract dated August 12, 1957 (R. 2-4). After due hearing, such predecessors were granted a certificate, unconditioned as to price, by Opinion No. 315 dated September 4, 1958 (R. 12-30). Such certificate required prompt acceptance, which was done. On November 13, 1958, the gas sales contract was duly filed as a rate schedule (R. 2-5) as required by the Commission's regulations, and was duly accepted. On January 30, 1959, deliveries commenced.

The New York Public Service Commission and other distributor interests prosecuted an application for review to the Court of Appeals for the Third Circuit, and that Court affirmed. *United Gas Improvement Co. v. F.P.C.*, 269 F. (2) 865. On petition for certiorari, this Court reversed and remanded the case to the Third Circuit, with directions to remand to the Commission for reconsideration and redetermination in the light of CATCO.[4] *United*

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[3] Petitioners (together with Maurice Frankel, now deceased) were the sole stockholders of Berkshire Oil Company, and succeeded to its rights and obligations upon its dissolution. Berkshire had sold the properties in question to Continental Oil Company. Berkshire had acquired the properties from J. R. and R. R. Frankel, the original applicants.

[4] *Atlantic Ref. Co. v. Public Service Commission*, 360 U.S. 378.

Gas Improvement Co. v. F.P.C., 361 U.S. 195.

On January 10, 1962, the Commission issued an order (R. 395-401) without hearing, notifying the parties to the remanded proceedings for the first time that the Commission proposed to impose refund obligations on the producers. Thereafter, the matters were set for hearing (R. 423-425). At the hearing all evidence offered by petitioners to support their contract price was excluded (R. 238-245; 208), and, on December 7, 1962, the Presiding Examiner issued a decision (R. 490-536) which, among other things, required petitioners to refund to the pipe line, with interest, all amounts previously collected by petitioners' predecessors in excess of a specified base price, less than the contract price.[5] The Commission affirmed the Examiner's decision in all material respects by its Opinion No. 398, issued July 7, 1963 (R. 549-593).

Meanwhile, the then owner of the properties in question and holder of the certificate, Berkshire Oil Company, sold the properties, as of November 2, 1961, to Continental Oil Company (R. 568-9) who sought and obtained a certificate authorizing it to continue the sale (In the Matter of Continental Oil Company, F.P.C. Docket No. CI62-1508; *cf.* R. 542-544, 568-9). Berkshire Oil Company was dissolved, and petitioners, its former stockholders, were substituted as parties to the instant docket (R. 568-9). The attention of the Examiner and of the Commission was called to the fact that petitioners neither sought a certificate nor were able to perform its responsibilities (*Cf.* R. 568-9, 542-5).

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[5] The contract price was 21.5¢ per Mcf. *plus* tax reimbursement. The Opinion No. 398 price was 20¢ per Mcf. *inclusive* of tax reimbursement. Tax reimbursement amounted to 2.05¢ per Mcf.

After Opinion No. 398 was issued, petitioners asked and were denied (R. 607-617) rehearing. Petitioners then sought review before the Fifth Circuit Court of Appeals. That Court reversed the order of the Commission but, in the course of its opinion and decree, made the rulings herein complained of.

REASONS FOR GRANTING THE WRIT

The only quarrel which petitioners have with the decision below relates to its holding that the Commission has the power here to require refunds. In reaching this result the Court failed to give proper weight to the decisions of this Court on the same subject, failed to respect the legality of the rates on file, and gave to the former proceedings for review effect equivalent to a stay, although no stay was sought or granted, and, although the Natural Gas Act provides to the contrary.

I.

IN RECOGNIZING AN OBLIGATION TO MAKE REFUNDS THE DECISION BELOW IS IN CONFLICT WITH PRIOR DECISIONS OR OPINIONS OF THIS COURT AND IS CONTRARY TO THE NATURAL GAS ACT.

A. In the instant case, the sole and only effect of the Commission's "certificate" issued to petitioners is to order refunds. On its face, it orders reparations. In order to fix the level of the refunds, the Commission necessarily determined that the rates theretofore collected were too high. Both such determinations are beyond the power of the Commission. " * * * under the Act, the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those

'to be thereafter observed and in force.'" *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591, 618. And see: *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246; *T.I.M.E. v. United States*, 359 U.S. 464; *Hope Natural Gas Co. v. F.P.C.*, 134 F. (2d) 287 (C.A. 4th), rev'd on other grounds 320 U.S. 591.

The scheme of the Act has been well explained in this Court's decisions. *Cf. United Gas Pipe Line Company v. Mobile Gas Service Corp.*, 350 U.S. 332, 340-346; *United Gas Pipe Line Company v. Memphis Light, Gas & Water Div.*, 358 U.S. 103; *F.P.C. v. Hope Natural Gas Co., supra; Montana-Dakota Utilities Co. v. Northwestern Public Service Co., supra.* The Act authorizes the natural gas company to fix the initial rate. When filed, the initial rate becomes the only legal rate. It may be changed only in a proceeding under Section 5 of the Act (rate review) or under a proceeding under Section 4(e) (rate increase and review). In either instance the change is prospective, except that if a proposed rate increase is suspended, an obligation to refund that portion of the increase found to be excessive may be imposed in the event the natural gas company chooses to put the increased rate into effect. The only control permitted by the Act over initial rates is the power to impose, prospectively, a rate condition in the certificate, in which event a refund obligation may also be included as to rates thereafter to be collected. The only refunds lawfully imposed under the Act are those to which the natural gas company has consented, either by putting an increase into effect under Section 4(e) or by accepting a certificate containing a prospective condition under Section 7.

It is beyond question that in a Section 5 (or Section 4(e)) proceeding the Commission may not order retro-

spective refunds, or, for that matter, even determine the propriety of past rates—this because Congress designedly excluded any power of the Commission to correct past error retrospectively. To say that Congress intended that retroactive rate reductions of filed rates could be enforced by the Commission by the subterfuge of inserting a rate condition in a certificate is to say that reparations **can** be ordered and that the "filed rate" doctrine is a one-way street.

The significance of the instant reparations order is dramatized by the situation in which these petitioners find themselves. An unsought, unwanted and unacceptable "certificate", impossible of performance,[6] is thrust upon them. All that it could accomplish, if legal, is to order the repayment of past excessive rates. No exercise in semantics can change the character of such an order. Its results are "reparations", which the Commission is powerless to grant.

B. The importance of the proper resolution of this issue to the administration of the Natural Gas Act goes beyond the circumstances here. If the decision below is correct in holding that rates on file and collected at a time when unconditional permanent certificates are in effect may be ordered refunded, the so-called "filed rate doctrine" is effectively destroyed. Further, producers will be constrained not to make deliveries until all possibility of judicial attack has concluded—which, in this case, would mean that no gas would yet be moving in the line more than six years after the unconditional certificate was granted.

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[6] The certificate order authorizes "the sales and services proposed by * * * J. R. Frankel, et al., successor to Berkshire Oil Company, in the contract with Transco * * * " J. R. Frankel, et al., proposed no sale or service and were in no condition to perform.

II.

THE DECISION BELOW CONFLICTS WITH THE NATURAL GAS ACT IN ISSUING A CERTIFICATE TO ONE NOT ELIGIBLE.

Section 7(c) of the Act (15 U.S.C. Section 717f(c)) permits a certificate to be issued only if the applicant is a "natural gas company" and is "able and willing properly to do the acts and to perform the service proposed" and that the "proposed * * * sale * * * is or will be required by present or future public convenience and necessity * * * " Here, the facts are that petitioners propose no service or sale, are unable and unwilling to do any acts or perform any service, and there is no "sale" to be required by the public interest. Under the plain language of the statute a "certificate" may not be issued them.

III.

THE DECISION BELOW CONFLICTS WITH THE NATURAL GAS ACT IN INFERRING A DUTY ON PETITIONERS TO OBTAIN A STAY OF THE PRIOR CERTIFICATE ORDER AND IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE IN FINDING THAT INTERIM RELIEF WOULD HAVE BEEN GRANTED, OR, IF GRANTED, EFFECTIVE.

The Court of Appeals stated (335 F. (2d) at p. 1018; Petition in No. 671, p. 31a) that "the producers' plight was not brought about by the failure of the petitioning intervenors to obtain a stay, but came from the action of the producers in making the deliveries under certificates which, though final, were then under direct judicial

attack * * * " and that it "was up to them [the producers] to seek interim protective relief from the Commission, and there is no indication that extensions of time or other appropriate relief would have been declined by the Commission".

These holdings are not supported by evidence, overlook the provisions of Section 19(c) of the Natural Gas Act (15 U.S.C.A. Section 717r)[7] and place, retroactively, a burden upon the producers not warranted by the law or the practicalities of the situation. There was no "interim protective relief" practically available to the producers as successful applicants for certificates. A delay from the Commission for accepting the certificate until final judicial determination would have imposed irreparable injury on both producer and consumer for the gas would not yet be moving in the pipe lines, the cities of the North and East might have had chill houses over several cold winters and the producers might have lost their leases. In view of the pipelines' need for the gas, it is doubtful that the Commission would have granted any delay of performance to a successful applicant. The only parties who might have obtained interim protective relief were the distributor-intervenors, and, for obvious reasons, they did not choose to act.

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[7] See *infra*, p. 5a.

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Being excerpts from the Natural Gas Act, as amended (15 U.S.C. § 717a, *et seq.*) :

> Sec. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.
>
> (b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.
>
> (c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by the natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the

proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [15 U.S.C. § 717c]

Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall

fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. [15 U.S.C. § 717d(a)]

* * * * *

Sec. 7: * * *

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: * * *

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: * * * [15 U.S.C. § 717f(c)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified appli-

cant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [15 U.S.C. § 717f (e)]

* * * * *

Sec. 19: * * *

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [15 U.S.C. § 717r(c)]

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§ 717c 3a

§ 717d(a) 4a

§ 717f(c) 4a

§ 717f(e) 2, 5a

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Petitioner, J. Ray McDermott & Co., Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on August 14, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 335 F. (2d) 1004, and is printed as Appendix B to the petition of The United Gas Improvement Company, et al., No. 671, October Term, 1964, (herein referred to as "UGI petition") for a writ of cer-

tiorari to review the same judgment.[1] The opinions of the Federal Power Commission are reported at 30 F.P.C. 283 and 30 F.P.C. 682, and are printed in the Joint Appendix filed in the Court of Appeals, copies of which have been deposited with this Court by the Solicitor General (R. 550-93, 607-17).

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 1964. On September 3, 1964, petitioner applied for rehearing. On September 21, 1964, rehearing was denied. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED[2]

Whether the Federal Power Commission may, under Section 7(e) of the Natural Gas Act, retrospectively review rates and impose retroactive refunds because an unconditional permanent certificate issued to a producer is thereafter set aside by the Courts.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, as amended (15 U.S.C. Sections 717-717w), are set forth in Appendix A, *infra*, pp. 1a, et seq.

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[1] The opinion is also copied as an appendix to the respective petitions in Nos. 678 and 714.

[2] In its specification of errors in its brief to the Court of Appeals, petitioner had complained of the Commission's failure to allow petitioner reimbursement of amounts paid the United States in lieu of severance taxes. Petitioner believes that it was the intention of the Court of Appeals to cover this point in its order of remand (see 335 F. (2d) at pp. 1020-1, n. 59; Petition of The United Gas Improvement Company, et al., No. 671, p. 36a). If Petitioner is wrong in its interpretation of the decision below, then the additional question is presented: Whether reimbursement should be allowed for amounts paid to the United States in lieu of state severance taxes, at least to the extent reimbursement of state severance tax is allowed?

STATEMENT

On August 10, 1959, the Federal Power Commission (Commission) issued Opinion No. 327[3] granting to petitioner an unconditional permanent certificate of public convenience and necessity authorizing sales of gas to Hope Natural Gas Company (Hope) at a price of 23.55¢ per Mcf, including tax reimbursement of 2.05¢ per Mcf.[4] The Public Service Commission of New York (New York) sought judicial review of Opinion No. 327 but did not seek to stay its effectiveness.[5] Therefore, petitioner filed its contract with the Commission and commenced deliveries of gas. With CATCO[6] as a guide the Court of Appeals for the District of Columbia[7] reversed the Commission and remanded the proceedings to the Commission to give the producers the opportunity to augment the record to support their contract prices.

After the mandate returned from the Court of Appeals the Commission took no immediate action.[8] On May 10, 1961, the Commission consolidated the remanded pro-

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[3] 22 FPC 378; R. 116-141.

[4] This price prevails only for that part of the gas produced from State of Louisiana water bottoms. The bulk of the gas is produced from Federal water bottoms, or disputed water bottoms and the initial contract price for such gas is 21.7625¢ per Mcf.

[5] New York did not seek a stay from the Commission or the reviewing court. In this regard Section 19(c) of the Natural Gas Act, 15 U.S.C. 717r(c), provides:

> "(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."

[6] *Atlantic Ref. Co. v. Public Serv. Comm'n*, 360 U.S. 378.

[7] *Public Serv. Comm'n v. FPC*, 287 F. 2d 146 (C.A. D.C.), cert. denied, 365 U.S. 880.

[8] After the CATCO decision Long Island Lighting Company filed a motion requesting the Supreme Court to amend its judgment to require the Court of Appeals for the Third Circuit to retain jurisdiction "to enable it to direct the payment of any refunds which may become payable." In reliance on *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, Long Island noted that the Commission lacked power to order refunds "except pursuant to further order of the Court of Appeals". The Supreme Court denied this motion.

ceedings with the Southern Louisiana Area Rate Proceeding in Docket No. AR61-2.

On January 10, 1962, the Commission issued an order warning petitioner that it intended to grant refunds to the extent it was empowered to do so at the conclusion of the proceeding (R. 395). On March 7, 1962, the Commission issued an order denying certain Applications for Rehearing of the January 10, 1962, order, severing its certificate proceedings from the Southern Louisiana Area Rate Proceeding; and consolidating them for hearing with other producer certificates (R. 410).

A hearing was conducted before a Presiding Examiner who issued his decision on December 7, 1962 (R. 491). Appeals to the Commission were filed by various parties. On July 17, 1963, the Commission issued Opinion No. 398[9] in which it reduced petitioner's price to 20.0¢ per Mcf, including tax reimbursement,[10] and adopted the Presiding Examiner's decision that refunds were required with seven per cent interest on all amounts collected in excess of the conditioned price from the date of initial delivery.

Petitioner filed a timely Petition for Review in the Court of Appeals for the Fifth Circuit, alleging several errors made by the Commission. On August 14, 1964, the Court of Appeals for the Fifth Circuit issued its opinion[11] in which it found that the Commission erred in excluding cost and economic evidence; that the Commission erred in imposing a price moratorium on petitioner's permanent certificates; that the Commission could condition the "take or pay" clauses in petitioner's contract

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[9] 30 FPC 283; R. 549.

[10] 18.5¢ per Mcf. for the Federal and Federal-State conflict areas.

[11] Seven other producers filed petitions for review in the Fifth Circuit. Pursuant to procedures agreed upon by the Commission, producer counsel and the Court, the various petitions were consolidated for oral argument, briefing schedules and preparation of the record.

upon a future decision in a rulemaking docket; and that the Commission had authority to require retroactive refunds, but that the Commission must first make a just and reasonable rate determination in appropriate proceedings in order to determine the amount of the refund. In view of its other holdings the Court did not discuss the questions raised by petitioner as to the validity of the Commission's "in-line" price determination or the failure to allow reimbursement for amounts paid the United States in lieu of severance taxes.

REASONS FOR GRANTING THE WRIT

As to the issue of retroactive refunds, the Court of Appeals held[12] (first) that refunds could be required, but (second) only on the basis of the difference between the price collected and the rate found in a proper proceeding to be the just and reasonable rate. It is the first holding which petitioner here attacks. The second, under the circumstances of this case, would obviously be correct [13] were refunds to be ordered.

The Court of Appeals first found:[14]

> " * * * Under the structure of the Act, it has long been recognized, and never questioned, that ' * * * * under the Act, the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those "to be thereafter observed and in force." ' *FPC v. Hope*

[12] 335 F. (2d) at p. 1020; UGI petition, p. 35a.

[13] The Commission may not constitutionally fix a rate which results in confiscation. *Cf. Missouri, ex rel Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276; *Bluefield Water Works & Imp. Co. v. Public Service Commission*, 262 U.S. 679; *Los Angeles Gas & Electric Corp. v. Railroad Commission*, 289 U.S. 287. Petitioner had raised the issue of confiscation as to both the prospective and the retrospective (refund) rate levels established by Opinion No. 398, and had offered evidence (which had been excluded) to support its contention. In order to avoid a confiscatory refund order, where the issue is raised, it is necessary to determine a just and reasonable rate.

[14] 335 F. (2d) at pp. 1018-19; UGI petition, p. 32a.

Natural Gas Co., 1944, 320 U.S. 591, 618, 64 S. Ct. 281, 295, 88 L. Ed. 333."[15]

The Court then concluded that the Commission, though lacking the power "to retrospectively review rates and impose retroactive refund orders" nevertheless had "inherent power to recapture the fruits obtained under an invalid, that is illegal, order."[16] Because of the "unique circumstances of this case," the Court found refunds to be proper.

The effect of this holding is to vest in the Commission an undefined "equitable power", not granted it by the statute, to order reparations in any case in which an initial Commission order, though not stayed, is later reversed. It also gives to the Commission the power, denied to it by the statute, effectively to fix initial rates.

The Commission is a creature of statute, not a court of chancery. In theory, it possesses no powers not granted it by the statute. If it is, in fact, to possess such powers, the grant should come from the legislature, not the courts. A decision recognizing the existence of such powers is necessarily of grave import to the administration of the Act. In upholding the existence of a power to order reparations, the decision of the Court of Appeals is in conflict with prior decisions of this Court,[17] and of the Fourth Circuit.[18]

Further, the "filed rate" doctrine is the backbone

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[15] The Court also cited: *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246; *Panhandle Eastern Pipe Line Co. v. FPC*, 236 F. (2d) 289, 292 (C.A. 3rd); *T.I.M.E. v. United States*, 359 U.S. 464, 469-70.

[16] 335 F. (2d) at p. 1019; UGI petition, p. 33a.

[17] *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 618; *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 254.

[18] *Hope Natural Gas Co. v. FPC*, 134 F. (2d) 287, 310-11 (C.A. 4th), rev'd on other grounds 320 U.S. 591.

of the rate-making theory of the Act. The Commission may not fix initial rates.[19] Rates lawfully on file may lawfully be collected unless lawfully changed in a proper proceeding under Section 4 or 5 of the Act,[20] which Sections operate **prospectively.** If the rates are lawfully on file under Section 4 of the Act, they can hardly be "unlawful" under Section 7. And a decision which **creates** a conflict between two sections of the same statute, which undermines the basic statutory "filed rate" theory, and which is in conflict with the decisions of this Court in the *Mobile* and *Memphis* cases,[21] is bound to be of the most serious consequence.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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[19] *United Gas Pipe Line Company v. Mobile Gas Service Corp.*, 350 U.S. 332, 340-346; *United Gas Pipe Line Company v. Memphis Light, Gas & Water Div.*, 358 U.S. 103.

[20] See pp. 1a-4a, *infra.*

[21] *Supra*, n. 19.

APPENDIX A

Being excerpts from the Natural Gas Act, as amended (15 U.S.C. § 717a, *et seq.*):

Sec. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by the natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the

proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [15 U.S.C. § 717c]

Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall

fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. [15 U.S.C. § 717d(a)]

* * * * *

Sec. 7: * * *

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: * * *

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: * * * [15 U.S.C. § 717f(c)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified appli-

cant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [15 U.S.C. § 717f (e)]

* * * * *

Sec. 19: * * *

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [15 U.S.C. § 717r(c)]

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IN THE

Supreme Court of the United States

October Term 1965

NO. 36

THE SUPERIOR OIL COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term 1964

NO._____

THE SUPERIOR OIL COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Superior Oil Company (Superior), Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals For the Fifth Circuit entered in *Callery Properties, Inc. v. Federal Power Commission,* on August 14, 1964, and the order denying Superior's Petition For Rehearing thereof entered September 22, 1964.

OPINIONS BELOW

The opinion of the Court of Appeals For the Fifth Circuit is reported in 335 F.2d 1004. Such opinion and

the Court's judgment are reprinted herein as Appendix "A" (Infra, Pg. 15). Respondent's Opinion No. 398 dated July 17, 1963 (J.A. 549-593) is reported at 30 FPC 283, and its denial of rehearing therein is Opinion No. 398-A issued September 11, 1963, reported at 30 FPC 682 (J.A. 606-617). These orders of Respondent were affirmed as to the matters covered by this Petition.

JURISDICTION

The original Opinion of the Court of Appeals was entered on August 14, 1964. Petition For Rehearing was denied by Order issued September 22, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 52 Stat. 821 (1938), 15 U.S.C. 717r(b), herein called "the Act".

QUESTIONS PRESENTED

The questions below are concerned with the power or authority of the Federal Power Commission (Commission) under the Act:

1. Does the Commission under the Act have inherent power to retroactively reduce rates established by its final unconditional orders as to which judicial review was sought, when pending such review no effort was made to stay the effect of such orders?

2. Pending judicial review of final orders of the Commission are such orders legal, effective and binding upon all parties unless stayed by the Commission or the reviewing court pursuant to Section 19(c) of the Act?

3. When, pending judicial review of final Commission orders, the petitioner aggrieved does not seek to stay

said orders pursuant to Section 19(c) of the Act, may such party thereafter receive reparation at the hands of the Commission for injury resulting from said party's failure to stay the aggrieving orders?

4. Does the Commission have authority to require refund of contract penalties paid as damages for a gas purchaser's failure to take and receive delivery of stated annual minimum volumes of gas, which is unproduced, undelivered and unsold?

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, et seq. (1938 as amended), 15 U.S.C. 717-717w, are set forth in Appendix "B" (Infra, Pg. 49). They are Section 1(b), 15 U.S.C. 717(b); and Section 19(b) and (c), 15 U.S.C. 717r(b) and (c).

STATEMENT OF THE CASE

This Petitioner, based upon separate gas sale contracts executed during 1958,[1] filed separate applications for the requisite certificates of public convenience and necessity. Respondent, after hearing, issued separate Orders dated August 10, 1959, granting the requested certificates. Respondent's Orders, without price condition, permanently certificated the two sales at initial prices of 21.4¢ per MCF[2] and 23.8¢ per MCF.[3] Each order required affirmative ac-

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[1]One covering gas to be produced from Federal domain lands and the other from lands in South Louisiana.

[2]Federal domain sale — no tax reimbursement. (J.A. 50-57)

[3]State of Louisiana sale — includes 2.3 cents per MCF tax reimbursement. (J.A. 193-199)

ceptance or rejection by Petitioner within thirty (30) days. Both certificates were duly accepted.

Subsequently each of Respondent's Orders of August 10, 1959, was subjected to judicial review by The United Gas Improvement Company (UGI) as Petitioner. These review proceedings were brought under Section 19(b) of the Act before different United States Courts of Appeals, i.e., the Fifth Circuit and Ninth Circuit. In neither instance did said UGI seek to stay the effect of Respondent's Orders pursuant to Section 19(c) of the Act.

On review, each of Respondent's Orders dated August 10, 1959, was vacated and the respective cases remanded.[4] By this time Petitioner had been selling its gas under the unconditioned final Commission Orders for nearly two (2) years.

After remand, until March 7, 1962 Respondent took no action for rehearing of the remanded proceedings, other than to order their consolidation for a hearing in the South Louisiana Area Rate Proceeding, Docket No. AR61-2. On that date it reversed its prior consolidation order, severed these proceedings from AR61-2, and consolidated them with other proceedings for the hearing out of which the present proceeding emerged. The hearing called was "for the limited purpose of determining the public interest initial price, or prices, applicable to these proceedings".[5]

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[4]**United Gas Improvement Co. v. FPC** (9 Cir. 1960), 283 F.2d 817, and **United Gas Improvement Co. v. FPC**, (5 Cir. 1961), 290 F.2d 147.

[5]J.A. 409-422. It is to be pointed out that the March 7, 1962 Order was issued upon rehearing of a January 10, 1962 Order; however, the January 10, 1962 Order was applicable to other parties only. — See Court's Opinion below FN 8 and 52, Appendix, Infra, PP. 19 and 40.

Hearing called by the March 7, 1962 Order was duly had, all evidence admitted being limited to that bearing on an "in-line" price (J.A. 201). The Presiding Examiner's Decision was issued December 7, 1962 (J.A. 491-540). Exceptions to said Decision were duly filed. On July 17, 1963, Respondent issued its Opinion No. 398,[6] and on September 11, 1963 denied rehearing thereon with its Opinion No. 398-A.[7] Respondent affirmed generally the Presiding Examiner's Decision which had established "in-line" initial prices of 18.5¢ per MCF for Petitioner's federal domain sale and 20¢ per MCF for Petitioner's sale within the taxing jurisdiction of the State of Louisiana, and had required refunds, with interest at 7% thereon, of amounts collected in excess of said "in-line" prices established. The refunds thus ordered to be made by this Petitioner amounted to more than 4.5 Million Dollars ($4,500,000.00) without interest thereon.

Petitioner duly sought review of Respondent's said orders before the United States Court of Appeals For the Fifth Circuit. By Opinion dated August 14, 1964 that Court[8] reversed the Respondent's order determining the initial prices required by public convenience and necessity for Petitioner's sales[9] and further held that Respondent had erred in imposing a moratorium on price increases Petitioner was authorized to seek under its contracts, and had erred in requiring that Petitioner refund money collected under rates which might be just and reasonable.

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[6]30 FPC 283, (J.A. 549)

[7]30 FPC 682 (J.A. 606)

[8]**Sub Nom Callery Properties, Inc., et al v. FPC, 335 F.2d 1004, Appendix, infra, Pg. 15.**

[9]Because much relevant and material evidence was not considered.

The same holding however affirmed the power of Respondent to order refunds in the circumstances of this case, if the propriety and amount of same were first legally determined, and affirmed Respondent's refund power as to amounts paid to Petitioner as damages for its buyer's failure to take delivery of the minimum annual volumes of gas required by the contracts.

This petition involves the holding of the Court below only as to the refund power of Respondent as to gas previously sold and delivered pursuant to rates it had established by order, and as to money damages paid because of buyer's failure to take.

REASONS FOR GRANTING THE WRIT

The holding of the Court below is that Respondent has the "inherent" power in the unique circumstances of this case to order retrospective refunds notwithstanding recognition in the same opinion that under the Act Respondent has no power to make reparation orders.[10]

The above holding is in clear conflict with the *Hope* case cited therein[11] which holds that the Commission has

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[10] "* * * * It is one thing for a Court to rule that under a valid certificate the Commission lacks the power to retrospectively review rates and impose retroactive refund orders. It is quite another for a court to conclude that a Commission lacking the power to do the former may yet not have inherent power to recapture the fruits obtained under an invalid, that is illegal, order. * * * *" (Opinion below, Appendix, infra, Pg. 41).

[11] "Under the structure of the Act, it has long been recognized, and never questioned, that '* * * under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those "to be thereafter observed and in force".' FPC v. Hope Natural Gas Co., 1944, 320 U.S. 591, 618, 64 S.Ct. 281, 88 L.Ed. 333." (Footnote omitted) (Opinion below, Appendix, infra, Pg. 40-41).

no power to make reparation orders under the Act, without respect to circumstance, and that its power to fix rates is one only of prospective application. To the same effect are the holdings in the cases cited in the footnote to the decision below. These cases are *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.* (1951), 341 U.S. 246; *Panhandle Eastern Pipe Line Co. v. FPC,* (3 Cir. 1956), 236 F.2d 289, 292; *T.I.M.E. Incorporated v. United States* (1959), 359 U.S. 464, 469-70.

The Circuit Court decision in *Hope,* supra, (4 Cir. 1943), 134 F.2d 287 at Page 310, elaborates even more fully on the Commission's limited power in this respect. It was there held

> "* * * it was not given authority to fix rates for the past or to award reparations on account of past rates. If it was not given the power to fix past rates, or award reparations based upon their unreasonableness, it certainly was given no power to do the same thing indirectly by making findings of fact as to past rates to be given effect in rate proceedings before state commissions."

While the Court below deemed the instant circumstances to be unique, it should be pointed out that these circumstances will arise in every case in which a Commission certificate order is appealed and reversed, unless sale is delayed pending review or after remand the initial rate level is retained. That such situations are not unusual is made manifest by the numerous reversals pointed to in the decision of the Court below.[12] It is to be noted that in

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[12]See FN 6, Appendix, infra, Pg. 17-18.

the instant case there were nine (9) separate certificate proceedings involved. Further, in the light of Respondent's current action refusing to adhere to the ruling of the court below reversing it on other points, it would appear that there will be many similar instances in the future.[13]

The decision below holding that notwithstanding Respondent's limited authority under the Act, such authority is to be expanded because of the unique circumstance here (a prior erroneous decision) and some "inherent" power arising therefrom would appear to find such "inherent" power without source and without any bounds upon its operation.[13a]

The attribution of "inherent" power to administrative agencies is contrary to established law which denies to them

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[13]See **Union Texas Petroleum, et al.**, Docket G.-13221, et al., Opinion No. 436-A issued October 8, 1964,——FPC——, wherein the Commission said with reference to the decision of the Court below on the point reversing the Respondent:

> "**** We are now seeking review of this decision **** we must decline to accept this decision as binding upon us"

pending review on certiorari. This case involves more than 100 separate dockets.

See also **H. L. Hawkins, et al.**, Docket G-18077, et al., Respondent's Order dismissing appeal from ruling of Presiding Examiner issued October 13, 1964,——FPC——holding:

> "We are, of course, aware of the opposite result reached in Callery Properties v. FPC ****" [however] **** "We see no reason to depart from the opinions cited above." This case involves forty (40) separate dockets.

[13a] That such power must be found to prevent retention of illegal fruits is clearly not the case. **Pan American Petroleum Corp. v. Superior Court of Delaware** (1961) 366 U.S. 656; **Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co., Inc.** (8 Cir. 1962) 297 F.2d 561; **Socony-Mobil Oil Company, Inc. v. Brooklyn Union Gas Co.**, (5 Cir. 1962) 299 F.2d 692, Cert. den. (1962) 371 U.S. 887.

powers of general jurisdiction and general equity powers unless expressly conferred by the particular act creating and empowering such agencies. See 73 C.J.S. 367-368; 1 *Am. Jur. 2d,* Pg. 866, Administrative Law, Section 70. The latter treatise points particularly to the error of the Court below:

> "It is well settled that an administrative agency has no inherent powers, although implied powers may sometimes be spoken of as 'inherent'." 1 *Am. Jur. 2d,* Pg. 869 (Sec. 73).

See also *Federal Trade Commission v. Eastman Kodak Co.* (1927), 274 U.S. 619, 623:

> "The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers. [cases cited omitted] It has not been delegated the authority of a court of equity,"

and *Montana-Dakota Utilities Co. v. FPC* (8 Cir. 1948), 169 F.2d 392, 397:

> "It is true that the powers of an administrative agency created by Congress to carry on governmental activities are circumscribed by the authority granted in the Act or Acts of Congress pertaining thereto",

and *Stark v. Wickard* (1944), 321 U.S. 288, 309.

It seems unnecessary to point out that if the substantive act denies a power, no power contrary to that denied may be implied. This is a matter of vital importance to the administration of the Act.

This would in fact exalt administrative agencies above courts of general jurisdiction with equity powers.[14] Administrative bodies would presumably be entitled to exercise this inherent power along with their normal prerogatives which include a presumption of the correctness of their findings if supported by substantial evidence, and such probably would carry through to their general rule-making power which may be based on their own expertise where rules are promulgated after notice, but without evidentiary hearing.[15]

The decision below covers, and erroneously determines, another point vital to the administration of the Natural Gas Act. The Court has assumed that pending review there is no validity nor binding effect to final orders of Respondent.[16] That assumption was necessary to reach the conclusion that Respondent might retrospectively require refunds of amounts collected pursuant to said final orders. This assumption and conclusion will totally frustrate Re-

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[14]Such inherent power, as to courts of general jurisdiction, appears to be limited to matters **in custodia legis, Inland Steel Co. v. United States** (1939), 306 U.S. 153; **United States v. Morgan** (1939), 307 U.S. 183; **United States v. Morgan** (1941), 313 U.S. 409.

[15]**Federal Power Commission v. Texaco, Inc.** (1964), —— U.S. ——, 84 S.Ct. 1105.

[16]"Quite apart from any problem of whether intervenor-distributors could have met applicable standards for a stay, the producer's plight was not brought about by the failure of the petitioning intervenors to obtain a stay, but came from the action of the producers in making the deliveries under certificates which, though final, were then under direct judicial attack and subject as any competent Power Commission counsel would know, to the possibility of judicial reversal. **** It was up to them to seek interim protective relief from the Commission, and there is no indication that extensions of time or other appropriate relief would have been declined by the Commission." (Footnote omitted) (Opinion below, Appendix, infra, Pg. 39).

spondent's certification process if the view of the Court below should be sustained. No new project, regardless of the public need therefor, nor the urgency of such need, could be initiated or any investment relative to same expended, until Respondent's certificating order had run the full gamut of judicial review and had been sustained. The impact of such a rule may be measured in part by the instant situation. These projects, found by Respondent to be required by the public interest in 1959, would not yet have been commenced. Petitioner under only the two contracts here involved has since 1959 contributed gas required, and in fact used, by the public in tremendous amounts. Petitioner's contribution as of a relatively recent date under these two contracts has been nearly 180 billion cubic feet of gas. During fiscal 1963 only, its gas deliveries under these two contracts amounted to more than 42 billion cubic feet of gas. It can hardly be doubted that the denial of this amount of fuel to the consuming public since 1959 would have produced great hardship and injury during the severe winters of the last five years.

The Court below raises, without a scintilla of evidence in this record, the possibility that Petitioner could have obtained interim relief. Such relief could only be sought under Sec. 19(c) of the Act. If the right to relief by parties aggrieved by the orders was uncertain, it seems clear that parties unaggrieved thereby could not obtain a stay. They would only be injured by a stay, and public injury from deprivation of the gas, which the public interest required would be unescapable.[17] Furthermore, the orders themselves required acceptance before the time for review would expire. (J.A. 50 et seq. and 193 et seq.)

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[17]**Virginia Petroleum Jobbers Ass'n. v. FPC,** (D.C. Cir. 1958), 259 F.2d 921.

Once accepted, Petitioner had no alternative to commencement of sale and collection of the rate established by said orders.[18]

The error of the Court in failing to recognize the effectiveness of Respondent's final orders pending review is made manifest from Section 19(c) of the Act itself. That section provides that the institution of proceedings for judicial review "shall not, unless specifically ordered by the court, operate as a stay of the Commission's order". This provision in the Act is clearly intended to effectuate without delay Respondent's orders found to be required by public interest. This congressional intent is nullified by the Court's holding.

In yet another matter the Court below erred on the facts and the law. It held that damages payable by a purchaser as a contract penalty[19] for failing to take delivery of minimum annual quantities of gas constitutes a sale of such gas, and that such damages are a part of the initial contract price which may be subject to refund.[20]

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[18] **Montana-Dakota Utilities Co. v. Northwestern Public Service Co.** (1951), 341 U.S. 246; **Hope Natural Gas Co. v. FPC,** (4 Cir. 1943), 134 F.2d 287, 311; **Civil Aeronautics Board v. Delta Air Lines** (1961), 367 U.S. 316, 325.

[19] J.A. 157-163 and J.A. 43-45. See **United States v. Bethlehem Steel Co. (1907)**, 205 U.S. 105, 119-121; and **Suburban Gas Co. v. Mollica** (N.J. 1943), 34 A.2d 892, recognizing the nature of such clauses.

[20] "When viewed realistically in the light of the imperative necessity for long term gas supply commitments, we agree with the Commission that this arrangement constitutes a sale within its power of regulation." (Appendix, Infra. P. 45)

It is to be recalled that the hearing before Respondent was limited to "**** the public interest initial price ****". Yet these damages were not incurred nor payable until after the first year's operations. Obviously they could not affect the **initial** price.

This holding violates the clear language of Section 1(b) of the Act which states that the provisions of said Act shall apply "to the sale in interstate commerce of natural gas for resale * * * but *shall not apply* * * * to any other sale of natural gas." (Emphasis added.)

The word "sale" as used in the Act must be given its ordinary meaning. That meaning cannot be altered by circumstances. The clear meaning is "A sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent," *State of Iowa v. McFarland, Com'r.* (1884), 110 U.S. 471, 478.

Said holding also ignores the terms of the contracts involved. Said contracts specifically provide that title to the gas to be sold shall not pass until the gas is delivered to buyer at the point of delivery specified in the contracts.[21]

The penalty-damage was paid because gas was not delivered. Such gas has not yet been produced or gathered. It has not moved. It is clearly beyond Commission jurisdiction under the holding of this Court in *Federal Power Commission v. Panhandle Eastern Pipe Line Co.* (1949), 337 U.S. 498.

Surprisingly, the holding here is at odds with the very recent determination of the Court below in *Marr v. Federal Power Commission,* (5 Cir. 1964), 336 F.2d 320. There it was held that an assignment of lease rights was a part of "production and gathering" and not a "sale" of gas. The effect of that transaction was not altered because it contemplated that the gas would ultimately enter interstate commerce for resale. Implicit in that holding was the salient

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[21]J.A. 154, 163, 186.

fact that the gas there involved had not been produced, gathered nor delivered. It had not moved in the reservoir and, therefore, was not sold. Jurisdiction did not lie although the transaction was contended to be a sale in "essence". It is the transaction reflected by the contract that must be considered. The same principle should apply here. A realistic view should not create a fiction. This matter of Respondent's jurisdiction is most important to the administration of the Act.

CONCLUSION

The decision below, entirely correct in other portions, has in its Sections IV and VI erroneously failed to recognize the Congressional limits placed by design in the Natural Gas Act on the authority of the Commission. To this extent it is in conflict with prior decisions of this Court and other Courts on matters essential to the administration of said Act. It is respectfully submitted that this petition should therefore be granted and the decision below modified and corrected as pointed out hereinabove.

Respectfully submitted,

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APPENDIX "A"

CALLERY PROPERTIES, INC., *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

The SUPERIOR OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Caroline Hunt SANDS and Loyd B. Sands, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

PLACID OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Margaret Hunt HILL, Trustee for Hassie Hunt Trust, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

J. RAY McDERMOTT & CO., INC., *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

OCEAN DRILLING & EXPLORATION COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

J. R. FRANKEL, et al., *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Nos. 20872, 20885, 20890-20892, 20967, 20989, and 21028.

UNITED STATES COURT OF APPEALS
Fifth Circuit.

Aug. 14, 1964.

Rehearings Denied Sept. 22, 1964.

Before RIVES and BROWN, Circuit Judges, and GROOMS, District Judge.

JOHN R. BROWN, Circuit Judge.

These cases present important questions under the Natural Gas Act, 15 U.S.C.A. § 717. These include the nature of the hearing and the scope of the pertinent evidence bearing on price in a § 7 application for permanent certificate, the legality of retroactive rate refund, and the validity of a moratorium on post-certificate § 4 price increases.

The cases are not new for us, certainly not, as to one case. Their presence here bears out the prediction of the dissenter[1] that "this case will be back several years and thousands of pages later."[2] Without assaying the balance of the dissenter's prophesy that "[n]o one will know more than is known now," it is ironic that we hold that we do not know enough because the Commission declined to receive and evaluate important evidence. Thus, in their fifth year, these applications must now go back to have the kind of hearing which we, and other Courts of Appeals, directed.

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[1]United Gas Improvement Co. v. FPC, 5 Cir., 1961, 290 F.2d 133, 138, 147 (dissenting opinion).

[2]The certificate of the records shows that some of these ran as high as 10,000 pages, others 5,000 and 6,000. Counsel, with the responsible concern demonstrated by Federal Power practitioners, public and private, have reduced it to 617 printed pages under our special FPC practice which became the forerunner of our amended Rules 23 and 24. See Hunt v. FPC, 5 Cir., 1962, 306 F.2d 334, 336, n. 1. The 17 briefs exceed 480 additional pages.

I.

These are all fallout from Catco[3] in which the Supreme Court reversed the unconditioned certificate because the 21.4¢ price was "out of line."

Within a short time after affirmance by the Third Circuit on August 4, 1959, of the Transco-Seaboard case,[4] the FPC in 6 separate formal hearings involving a total of 69 producer applications issued unconditioned certificates for South Louisiana (and offshore) sales at initial contract prices ranging from 21.4¢ per Mcf where no tax reimbursement was due to 23.8¢ including tax reimbursement. But within 4 months, the Third Circuit's Transco-Seaboard decision was summarily reversed.[5] On appeals taken by various distributor-intervenors, the grant of the certificates was reversed by this Court and Courts of Appeals for the Third, Ninth, Tenth, and D.C. Circuits.[6]

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[3]Atlantic Refining Company v. Public Service Commission of New York, 1959, 360 U.S. 378, 79 S.Ct. 1246, 3 L.Ed. 2d 1312.

[4]United Gas Improvement Co. v. FPC, 3 Cir., 1959, 269 F.2d 865.

[5]Sub nom. Public Service Commission of New York v. FPC, December 14, 1959, 361 U.S. 195, 80 S.Ct. 292, 4 L.Ed.2d 237.

[6]The original Commission opinions, and the court reversals are as follows (present petitioners shown in parentheses):

(1) Transcontinental Gas Pipe Line Co., Op. 315, 1958, 20 FPC 264, aff'd sub nom. United Gas Improvement Co. v. FPC, 3 Cir., 1959, 269 F.2d 865, reversed mem. sub nom. Public Service Comm. of New York v. FPC, 1959, 361 U.S. 195, 80 S.Ct. 292, 4 L.Ed.2d 237 (Placid in No. 20891, Hill in No. 20892, and Frankel in No. 21028).

(2) Texas Gas Transmission Corp., Op. 327, 1959, 22 FPC 378, reversed, Public Service Comm. of New York v. FPC, 1960, 109 U.S. App. D.C. 292, 287 F.2d 146, cert. denied, 1961, Shell Oil Co. v. Public Serv. Comm. of N. Y., 365 U.S. 880, 882, 81 S.Ct. 1030, 1031, 6 L.Ed.2d 192 (Callery in No. 20872, Sands in

On May 10, 1961, the FPC consolidated the remanded proceedings with the Southern Louisiana area rate proceeding.[7] On January 10, 1963, the FPC denied motions of some intervenor-distributors for security on possible rate refunds. Expressing the view that it has "power to redetermine these proceedings on the basis of the respective records as originally made and in the light of additional facts of which we may take official notice" without further hearing, the Commission nevertheless determined to "adhere to the view that it would be fair and wiser in the present

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No. 20890, McDermott in No. 20967, and Ocean Drilling in No. 20989).

(3) California Co., 1959, 22 FPC 252, reversed, United Gas Improvement Co. v. FPC, 9 Cir., 1960, 283 F.2d 817, cert. denied, 1961, Superior Oil Co. v. United Gas Imp. Co., 365 U.S. 879, 881, 81 S.Ct. 1030, 6 L.Ed.2d 191, 192 (Superior in No. 20885).

(4) Sun Oil Co., 1959, 22 FPC 351, reversed, United Gas Improvement Co. v. FPC, 5 Cir., 1961, 290 F.2d 133, cert. denied, 1961, Sun Oil Co. v. United Gas Imp. Co., 368 U.S. 823, 82 S.Ct. 41, 7 L.Ed.2d 27.

(5) Sunray Mid-Continent Oil Co., 1959, 22 FPC 361, reversed, United Gas Improvement Co. v. FPC, 10 Cir., 1961, 287 F.2d 159.

(6) Superior Oil Co., 1959, 22 FPC 369, reversed, United Gas Improvement Co. v. FPC, 5 Cir., 1961, 290 F.2d 147, cert. denied, 1961, Superior Oil Co. v. United Gas Imp. Co., 366 U.S. 965, 81 S.Ct. 1926, 6 L.Ed.2d 1255 (Superior in No. 20885).

[7]Docket No. AR61-2, 26 Fed. Reg. 4296 (1961).

The area pricing was initiated by Statement of General Policy No. 61—1, issued September 28, 1960. 24 FPC 818 (1960); 18 C.F.R. § 2.56 (1961). By the First Amendment to Statement of General Policy No. 61—1, issued October 25, 1960, the FPC fixed an area price level of 21.5 cents per Mcf plus tax reimbursement. 25 Fed. Reg. 10,488 (1960). Subsequently by the Fourth Amendment to Statement of General Policy No. 61—1, issued October 23, 1961, the FPC reduced the area price level for initial sales of gas from South Louisiana to 21.25 cents per Mcf, inclusive of tax reimbursement. 26 Fed. Reg. 10,342 (1961).

circumstances to offer the applicants a further opportunity to adduce evidence in docket numbers AR61-2 et al. In support of their proposed prices." But it ordered that rate collections "shall be subject to such refund provisions as the Commission may lawfully prescribe by its final order * * * to the extent, if any, that the rate which has been collected exceeds the rate ultimately found to accord with the requirements of the public convenience and necessity."[8] In overruling the petitions for rehearing, the FPC on March 7, 1962, severed the proceedings from AR61-2 and then "consolidated [them] for the limited purpose of determining the public interest, initial price, or prices, applicable to these proceedings."[9] In this order of March 7, 1962, the FPC noted that six weeks earlier, in the remanded Catco dockets, it had found the in-line level in South Louisiana to be 18.5¢ per Mcf, plus 1.5¢ tax reimbursement where applicable. Rejecting contentions by intervenor-distributors that a like finding should peremptorily be entered in these proceedings, the Commission nonetheless concluded that it "should afford the producers further opportunity to be heard."

The hearings thus scheduled were held before an Examiner June 18-21, 1962. At the outset of the hearing, the producers sought to introduce what the Examiner described as "a tremendous mass of cost-type, economic and financial evidence." This cost-of-service evidence followed generally

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[8]Superior (our Case No. 20885—see Items (3), (6), note 6, supra, was not a party to this order.

[9]Petitions to review the refund-warning order of January 10, 1962, were dismissed by us "without prejudice to the rights of petitioner to attack the validity of the orders * * * in petitions to review, * * * the orders of July 17, 1963, in the Commission's Opinion No. 398."

the pattern used by the Commission in prior determinations. Broadly speaking it demonstrated that on a cost-of-service basis the cost to the producers was considerably in excess of the contract price sought to be certificated in the pending applications. Other evidence bore upon the minimum financial requirements for finding and producing gas. These also used techniques and methods employed by the Commission in determining analogous minimum financial requirements. Other evidence showed the demand and supply situation existing both nationwide and in South Louisiana. Some was detailed, indicating that the demand for gas is increasing far in excess of the annual additions of gas supply. Other evidence tied this directly into the exploration for, and finding of, new gas supplies to meet the increased demands, the relation of field prices to those efforts, the impact of lowered prices on exploratory activity, and the like. Other evidence showed the nationwide increase in the current cost of new gas supply over the pre-Catco prices, the increase in the weighted average contract price in this period in relation to drilling and exploratory costs, and refutation of the assertion that contract prices in South Louisiana have leaped from plateau to plateau. We need not describe it in any greater detail since in affirming the Examiner's rejection of the evidence, the Commission characterized it as "economic and financial evidence" including that relating to "an individual company or on an area-wide basis" without regard to whether it was "the type characterized as cost-of-service studies, cash flow studies, demand-supply, cost, profit and market price trends, area cost-revenue trends, comparative well cost data and gas replacement costs * * *."

On the motion of the intervenor-distributor supported by Commission staff, the Examiner rejected all of this

evidence. In his decision of December 7, 1962, he (1) concluded that the in-line price for the pending sales was 18.5¢ per Mcf plus 1.5¢ per Mcf tax reimbursement where applicable, (2) directed that the producers refund with interest, all amounts previously collected in excess of the in-line levels of 18.5¢ and 20.0¢.[10] Accepting in the main all of the Examiner's findings and conclusions, the FPC by opinion 398, issued July 17, 1963, took these actions. It unanimously sustained the exclusion of producer cost data, and the finding that the in-line price was 18.5¢. By a 4-1 vote it approved the refunds.[11] In addition, the Commission—on the basis of a finding that rate filings to levels in excess of 23.55¢ per Mcf would cause widespread triggering throughout Southern Louisiana—imposed a moratorium on filings in excess of 23.55¢ until July 1, 1967, or until the conclusion of the pending Southern Louisiana AR61-2 proceeding, whichever is earlier.[12]

Petitions for review have been filed by the producers (see note 6, supra). The questions presented for our decision are these. (1) Did the Commission err in excluding the proffered cost and economic data evidence? (2) Did

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[10]The Examiner rejected a number of contentions of Staff and intervenor distributors, one of the Staff being that "excess" payments made to the producers under "take-or-pay" provisions for gas not delivered should be refunded.

[11]Refunds by Superior for collections under one temporary certificate prior to August 10, 1959, were excused based on the FPC's decision Skelly Oil Co. Op. 362, 1962, 28 FPC 401, subsequently reversed in Public Service Commission of New York v. FPC, D.C. Cir., 1964, 329 F.2d 242.

[12]The FPC rejected Staff's contentions on refund or take-or-pay prepayments, but it conditioned the certificates upon the ultimate outcome of a pending rulemaking proceeding, R—199, review of which was recently held to be premature by the D.C. Cir., 1964, 329 F.2d 242, 248.

the Commission err in imposing a moratorium on price increases in a permanent certificate? (3) Did the Commission err in ordering refunds of the amounts previously collected? (4) Did the Commission err in fixing the in-line price at the 18.5¢ level? (5) Did the Commission err as to take-or-pay refund provisions? (6) Did the Commission err in making the refund order applicable to Frankel and Placid's Docket No. 13184?

II.

Exclusion of Cost Evidence

[1, 2] We think that proper consideration of the Act and its elucidation in Catco demonstrates that the Commission erred in rejecting the proffered evidence on cost and other economic data. No doubt Catco is significant and binding, and we accept it without any effort to whittle it down. But the simple fact remains that it is a statute which we are expounding, and the statute does not refer to, much less speak of "in-line" price. To be sure, whether a proposed price is in-line or not is an important, sometime decisive, factor. But it is a factor to be weighed along with others in determining whether the proposed sale of gas in interstate commerce "is or will be required by the present or future public convenience and necesssity."[13]

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[13]Section 7(e), 52 Stat. 824, as amended, 56 Stat. 84, 15 U.S.C.A. § 717f(e) provides:

"* * * [a] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of * * * the Act and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, sale, operation * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and

In the Commission Catco proceeding the Commission, presumably reasoning that a post-certification § 5 rate hearing would afford ample protection against improvident prices, declined altogether to consider the reasonableness of the proposed price or its relation to public convenience and necessity. This approach seemed to find some basis in the structure of the Act in which the statutory provisions concerning rates were found in §§ 4[14] and 5[15] and not in § 7

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necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

[14]15 U.S.C.A. § 717c.

"4(a) All rates and charges made, demanded, or received by any natural-gas company for * * * the transportation or sale of natural gas * * * shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

"* * *

"(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission * * * schedules showing all rates and charges for any transportation or sale * * * together with all contracts which in any manner affect or relate to such rates, charges, classifications and services.

"(d) Unless the Commission otherwise orders, no change shall be made * * * in any such rate * * * except after 30 days' notice to the Commission and to the public. * * *

"(e) Whenever any such new schedule is filed the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing * * * may suspend the operation of such schedule * * * but not for a longer period than five months. * * * Where increased rates or charges are thus made effective, the Commission may * * * require the natural-gas company to furnish a bond * * * to refund, with interest, the portion of such increased rates or charges * * * found not justified. * * *"

[15]15 U.S.C.A. § 717d.

"5(a). Whenever the Commission, after a hearing * * * shall find that any rate, charge * * * collected by any natural-gas com-

which dealt with the initial application for certification, temporary or permanent. This argument acquired some operational support from the magnitude of the administrative problems, both in time and manageability, of turning every § 7 application into a full blown rate hearing to determine whether the proposed rate was "just and reasonable."

The Supreme Court in Catco forcibly rejected this approach of the Commission. The Court made clear that price was indeed important. It recognized, of course, that "the Act does not require a determination of just and reasonable rates in a § 7 proceeding * * *" or "that a 'just and reasonable' rate hearing is a prerequisite to the issuance of producer certificates." And the Court pointed out that it was the delay in processing § 5 proceedings that "requires a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7." But the Court immediately tied price to public convenience and necessity by requiring that the price "proposal must be supported by evidence showing their necessity to 'the present or future public convenience and necessity' before permanent certificates are issued." The recent increase in the price levels the Court went on, "does make price a consideration of prime importance" and "[w]here the application on * * * presentation of evidence signals the existence of a situation that probably would not be in the

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pany * * * is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge * * * practice or contract to be thereafter observed and in force and shall fix the same by order: * * *; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

public interest, a permanent certificate should not be issued." After stressing "public convenience and necessity" not less than six times in the space of two paragraphs, 360 U.S. 378, at 390-391, 79 S.Ct. 1246, at 1254-1255, the Supreme Court for the first time articulates the "in-line" concept. "Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary." 360 U.S. 378, at 391, 79 S.Ct. 1246, at 1255.

The Court stressed that by certificate conditions under § 7, "the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act. Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate." 360 U.S. 378, at 392, 79 S.Ct. 1246, at 1255. Of unusual importance here was the Court's statement in the analysis of the deficiencies of that record in which "no effort was made to give the 'reason why' * * * the proposed price was some 70% higher than the weighted average cost of 'existing gas to the purchaser.' "

[3, 4] As though Catco began and ended with "in-line" the Commission and the intervenor-distributors are mesmerized by this catch phrase into supposing that the Commission's responsibility is discharged with that limited inquiry and if unsatisfied on that score, it is free to reject out of hand a producer's application for a new service.

Catco did not so hold, and this approach ignores the plain terms of the statute which are no way diminished by Catco. Vast as is the discretion of the Commission, the statute, §7(e), footnote 13, supra, accords positive rights to natural gas producers desiring to sell gas in interstate commerce. A producer does not, of course, have an absolute right to engage in the sale. It does, however, subject to compliance with reasonable procedural rules and requirements of the Commission[16] have an absolute right to a consideration of the application by the Commission and the right to have it granted "if it is found that the applicant is able and willing properly to do the acts and to perform the service * * * and the * * * sale * * * is or will be required by the * * * public convenience and necessity." The Commission does not, therefore, fulfill its statutory duty by the limited inquiry into whether the price is "in-line." Conversely, it has no power to deny the application solely on the ground that the price it not "in-line." To be sure, if the proposed price is not "in-line," this may become the dominant factor in denying the application. But it must be done as a part of the larger element of "public convenience and necessity." The Court makes this clear in FPC v. Transcontinental Gas Pipe Line Corp., 1960, 365 U.S. 1, 8, 17, 22, 81 S.Ct. 435, 439, 444, 5 L.Ed.2d 377: "In fact in interpreting this very section we said that '§7(e) requires the Commission to evaluate all factors bearing on the public interest' * * *." Later, the Court states, "In this connection, it must be realized that the Commission's powers under § 7 are, by definition limited. * * * The Commission cannot order a natural

[16]FPC v. Texaco, Inc., 1964, 377 U.S. 33, 84 S.Ct. 1105, 12 L.Ed.2d 112.

gas company to sell gas to users that it favors; it can only exercise a veto power over proposed transportation and it can only do this when a balance of all the circumstances weighs against certification."[17]

[5] In the concept of public convenience and necessity, price is, of course, very important. But it is not the whole thing. And certainly under a statutory scheme for a utility-type of regulation for the sale, not of a service, but of a depletable commodity,[18] where the Commission serves primarily as a rate-reviewing, not a rate-fixing agency,[19] and in which the entry into the regulated market is the voluntary act of the gas producer,[20] it is perfectly evident that many factors other than price alone bear upon public convenience and necessity and, in turn, upon price.

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[17]Rejecting the Respondent's claim that the Commission had used its power to prevent a levering upward of field prices to bar direct sales of gas, it said: "Certainly such action would be contrary to our previous statements that the term 'public convenience and necessity,' connotes a flexible balancing process, in the course of which all the factors are weighed prior to final determination. United States v. Detroit & Cleveland Navigation Co., supra, 326 U.S. 236, 66 S.Ct. 75, 90 L.Ed. 38.[19] * * * as the Commission stated, 'countervailing factors suffice to tip the balance against the grant of the authority requested by Transco.'"

Footnote 19 reads: "19. Compare the cases which have held that it was error for the Commission to refuse to consider certain factors within its power of notice. E. g., City of Pittsburgh v. Federal Power Commission, 99 U.S. App. D.C. 113, 237 F.2d 741."

[18]Chief Judge Tuttle has pointed out: "This is concededly a difficult standard to specify especially in light of the fact that producers are in reality selling gas which they own and are not, in the traditional sense, primarily furnishing a service to the public." Gulf Oil Corp v. FPC, 5 Cir., 1958, 255 F.2d 556, 557.

[19]United Gas Pipeline Co. v. Mobile Gas Service Corp., 1956, 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373.

[20]FPC v. Hunt, 1964, 376 U.S. 515, 84 S.Ct. 861, 11 L.Ed.2d 878, 883.

[6] One of the most critical factors is, of course, the extent and nature of the demand. We decline to believe that the FPC can be oblivious to what all others know firsthand of occurrences since 1956-57, the era that begat the so-called Catco "in-line" price. Population is increasing at explosive rates particularly in metropolitan areas in the South, Southwest and West Coast. What are, for example, the insatiable energy requirements of this ever-expanding population and industrial complex? If the demand is present, the next decisive question is, what about the supply? Can it reasonably be met by the gas now under dedication? Where and from what sources can the demand reasonably be satisfied? And whether this does, or does not, bring about price increases, the decisive question then becomes what price will it take to get the needed gas? The latter question, of course, sets in train a whole series of subsidiary inquiries. This is so because even under a system of voluntary initial dedication of gas, the acceptable price may not be measured by the intransigent demand of a producer. Inherent reasonableness in terms, say, of the likelihood that the needed supply of gas will be obtainable from others by exploration and new production and other similar questions would remain. Other factors could be named.[21] The important thing is that price is not the sole criteria.

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[21]Several factors were mentioned just this term in FPC v. Hunt, 1964, 376 U.S. 515, 84 S.Ct. 861, 11 L.Ed.2d 878. The Court there concluded that the purpose as revealed by the legislative history was to give the FPC "an opportunity to scrutinize the financial set-up, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure."

[7] A price-only approach does more than substitute for the statutory standard of "public convenience and necessity" a rigid, mechanical arithmetical guide. It is conceivable that such a test could imperil the public interest by foreclosing needed gas from the interstate market solely because the price is out of line. The so-called "in-line" concept necessarily involves a question of time—here in the neighborhood of 1956-57 prior to the contaminating influence of the initial Catco contract. It involves also a selection of so-called comparables and a rejection of those which are either "too high," or are thought to be so, or are otherwise "suspect."[22] Essential as it is that the Commission scrutinize carefully apparent price increases, it is inconceivable that Congress meant to freeze the rates to 1956-1958,[23] or to any other particular time for that matter.[24]

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[22] See *Morris, Recent Independent Producer Certificate Cases:* The "Suspect Order" Rule, 32 Geo. Wash. Law Rev. 489 (1964); Amerada Petroleum Corp., Op. No. 422, 1964, FPC [Nos. CI62-1544, March 23, 1964].

[23] The 18.5 cents per Mcf price fixed here was the figure previously determined to be appropriate in the remanded Catco case, 1962, 27 FPC 96. This line was actually a 1956 level.

> The Commission forecasts that the area proceedings will result in just and reasonable rates. But it recognizes that "[to hold the line] does not mean that irrespective of evidence to the contrary an absolute price freeze is to be imposed until some future date when area proceedings ultimately establish 'just and reasonable' rates."

In re Amerada Petroleum Corp., Op. 422, 1964, FPC [Docket No. C 162-1544, March 23, 1964].

[24] Indeed, the very nature of present and future public convenience and necessity forbids a look-back to 1956-57 only. The inquiry must include the time of the award. FCC v. Pottsville Broadcasting Co., 1940, 309 U.S. 134, 145, 60 S.Ct. 437, 84 L.Ed. 656; Easton Publishing Co. v. FCC, 1950, 87 U.S.App.D.C. 344, 185 F.2d 987, 991.

Rather, the public interest is protected by requiring the Commission to consider price in terms of the whole public convenience and necessity. Indeed, this was recognized by the Ninth Circuit in one of the very cases precipitating the remands now under review.[25] That Court rejected as being "without merit" the "contention that the price line must necessarily accord with the pre-Catco line." The Court went on, "[w]e agree with the view expressed by the Commission in Texas Gas Transmission Corporation et al., 22 F.P.C. 378, 388, that factors such as increased production costs since Catco, comparative accessibility of field locations, and comparative depth of sands tend to make pre-Catco prices irrelevant for comparative purposes in other cases." United Gas Improvement Co. v. FPC, 9 Cir., 1960, 283 F.2d 817, 823. Earlier that Court stated that "* * * the Commission properly refers to circumstances under which an unconditional and permanent certificate might be issued notwithstanding the fact that the proposed price is out of line." 283 F.2d 817, 821.

And this same theme was echoed by each of the other remaining Courts: "It is conceivable" said the Tenth Circuit, "that in some circumstances public convenience and necessity may require certificating of a sale when the price is 'out of line' " [26] The D.C. Circuit pointed out alternative courses for the Commission where the "prices * * * are suspiciously higher." One course was to impose interim conditions. As to the other, it offered this solution. "On the other hand, it [the Commission] may grant unconditional certification upon evidence sufficient to 'support a

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[25]See (3), note 6, supra.

[26]United Gas Improvement Co. v. FPC, 10 Cir., 1961, 287 F.2d 159, 163.

finding of public convenience and necessity.' "[27] We spoke in terms of burden making "[i]t * * * clearly incumbent on the proponent of [the proposed] rate to make some showing of the 'reason why' (as it was expressed in the CATCO opinion) * * *," the proposed rate was a proper initial rate in view of rates half that high just a few years before.[28]

[8] Evidence of the kind proffered by these petitioners bore upon these questions of public convenience and necessity. That the evidence would, in whole or in part, be pertinent to a § 4 or § 5 "just and reasonable" rate hearing is a matter of no decisive significance. If it proves too much, or proves too little, this is a matter calling for the expert evaluation and judgment of the Commission.[29] We have no fear that with resourceful ingenuity the Commission can develop procedural devices which will keep these

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[27]Public Service Commission v. Federal Power Commission, 1960, 109 U.S.App. D.C. 292, 287 F.2d 146, 149. The Court then remanded as follows: "The order, insofar as it grants unconditional certification to the initial price proposals of the producer applicants, is reversed and the case is remanded to the Commission for further proceedings in which the producer applicants may, if they so choose, either augment the record so as to support a certification without price condition, or seek a certification appropriately conditioned." 287 F.2d 146, at 150.

[28]United Gas Improvement Co. v. FPC, 5 Cir., 1961, 290 F.2d 133, 138.

[29]The argument that to receive evidence of this nature is to allow a producer a fair rate of return on excessive costs is a non sequitur. We agree with Judge Wright that "[T]he Commission is not required to subsidize high cost producers with consumers' money." Atlantic Refining Co. v. FPC, 1963, 115 U.S. App. D.C. 26, 316 F.2d 677, 680. But whether costs are "too high" or even "high" are comparative factual matters calling for evidence and evaluation.

§ 7 hearings from being bogged down into the full dress § 4 or § 5 rate hearing. Its awesome task calls for great administrative inventiveness which will assure to all, producer, consumer, and public alike, the full measure of statutory rights. Hill v. FPC, 5 Cir., 1964, 335 F.2d 355, n. 27, [July 23, 1964.].[30]

[9] The task facing the Commission in this developing field calls for innovation and adaptation. It is not, therefore, enough merely to inquire whether the price is "in-line". On the other hand, for § 7 purposes, there need not be a full dress § 4 or § 5 rate hearing. The Commission must, however, hear and evaluate all relevant evidence bearing on

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[30]Following the Supreme Court's lead in its admonition that the Commission must find ways to expedite proceedings, we there pointed out that much delay flows from an overuse of motions to dismiss instead of an evaluation of evidence for its intrinsic worth in the light of the Commission's expertise. The instant cases graphically illustrate that a motion to strike evidence relating to complex activities is an equally awkward procedural device of limited utility. For all we know, had the Commission received the proffered evidence, it would have held it to be wanting, and that might well have been the end of the matter. Now the case must go back and proceed through lengthy hearings, rehearings, exceptions, arguments before the Commission, rehearings and reargument to receive and evaluate this very evidence. In terms of time and the public interest, the apparent time-saving device of striking this evidence as irrelevant has proved again that the shortest way through is often the longest way around. Determining the utter and irretrievable irrelevance of a large body of evidence under the nuances of a concept as elusive as public convenience and necessity is indeed a summary procedure. And we have many times pointed out that summary procedures "present a treacherous record for deciding issues of far-flung import, on which * * * [Courts] should draw inferences with caution from complicated courses of legislation * * * and practices." Kennedy v. Silas Mason Co., 1948, 334 U.S. 249, 257, 68 S.Ct. 1031, 1034, 92 L.Ed. 1347; Chapman v. Hawthorne Flying Service, 5 Cir., 1961, 287 F.2d 539, 541.

public convenience and necessity when it is urged, or held,[31] that the proposed price is out of line.[32]

III.

Price Moratorium

So far as rates are concerned, the Commission did two principal things. First it conditioned the permanent certificate on a reduction of the initial rate to 18.5¢ per Mcf. Second, it found that there was a triggering[33] at 23.55¢, and in order to prevent retriggering, it prohibited the producers from exercising their contract rights to file rate increases above 23.55¢ until the conclusion of AR61-2 or July 1, 1967, whichever is earlier. That moratorium does permit, however, increases from 18.5¢ up to 23.55¢.[34]

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[31]Nothing will keep the Commission from doing this by a two-step proceeding. See Hill v. FPC, supra. Indeed, this Court has recently approved separate trial by separate juries of validity-infringement on the one hand and damages on the other in patent cases. Swofford v. B. & W., Inc., 5 Cir., 1964,——F.2d——, [July 28, 1964].

[32]The evidence relating to cash outflow and replacement cost proffered and rejected in Public Service Commission of New York v. FPC, D.C.Cir., 1964, 329 F.2d 242, was much more limited than that here. Nor do we regard California Oil Co. v. FPC, 10 Cir., 1963, 315 F.2d 652 (inquiry as to what the line was); Atlantic Refining Co. v. FPC, 1963, 115 U.S.App.D.C. 26, 316 F.2d 677 (question of in-lineness stipulated to be sole issue), as holding contrary to our decision.

[33]Some of the proffered but rejected evidence, see Part II, supra, actually touched on the factual basis, or lack thereof, of the Catco assumption that "[n]ew price plateaus will * * * be created." 360 U.S. 378, at 390, 79 S.Ct. 1246 at 1254. We assume however, that there was a factual basis for the Commission's finding.

[34]The moratorium has a present impact. See, e.g., Superior's contract with United permitting escalation to 23.5 cents plus 2.3 cents tax reimbursement.

[10] Although the Supreme Court stated that the "extent of [the] power [to condition price changes] in permanent certification is not before us now," we think the full import of its recent decision, reversing this Court, Federal Power Commission v. Hunt, 1964, 376 U.S. 515, 84 S.Ct. 861, 11 L.Ed.2d 878, 886, compels a holding that the Natural Gas Act forbids a moratorium on price increases as a condition to the issuance of a permanent certificate.

[11] Of course the statute gives the Commission the power to attach "such reasonable terms and conditions" to the issuance of the certificate "as the public convenience and necessity may require." See footnote 13, supra. Literally, no distinction is made between temporary and permanent certificates. And undoubtedly there are a number of conditions which lawfully may be attached to the issuance of a permanent certificate.[35] But as the Court did there, when we examine the interplay between § 7 on certification and §§ 4 and 5 on "just and reasonable" rates and rate changes, we think that Congress did not intend that the Commission have the power by a certificate condition to supersede the working of § 4. By § 4 Congress established a statutory scheme in which rates are prescribed and become effective by contractual provision. United Gas Pipeline Co. v. Mobile Gas Service Corp., 1956, 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373; United Gas Pipeline Co. v. Memphis Light, Gas & Water Division, 1958, 358 U.S. 103, 79 S.Ct. 194, 3 L.Ed.2d 153.

There is no real question about the operative process or effect of § 4(e). Subject only to suspension for a limited brief period of time and the obligation to refund on final

[35] 376 U.S. 515, 84 S.Ct. 861, 11 L.Ed.2d 878, 885, n. 3.

determination, the rates prescribed in the contract become effective when filed. The only real problem is the point at which the rights of a producer and the powers of the Commission under § 4 become applicable. This the Court answers squarely in Hunt. "Under the procedures of the Act, it is at the point of permanent or unconditional temporary certification that the provisions of § 4 become applicable." 376 U.S. 515, 84 S.Ct. 861, at 866, 11 L.Ed.2d 878, at 884. It is at that point that "[t]he gas has been permanently certificated into interstate commerce * * *" and, the Court continues, at that point "the independent producer is then free to pursue the rate filing procedure of that section."

Other parts of the opinion make clear that the critical distinction is between the temporary, conditional certificate, on the one hand, and a permanent certificate on the other. Thus the Court points out, "[o]nce a permanent certificate is granted, the Commission can correct an improper rate only under § 5 of the Act * * *," 376 U.S. 515, 84 S.Ct. 861, 865, 11 L.Ed.2d 878, 883. In view of the necessity for some character of certificate before the gas "can move into interstate commerce" and the statutory right to apply "for temporary authorization" the Court recognizes that "* * * the Commission must have the authority to condition a temporary certificate so as to avoid irreparable injury to affected parties". But, the Court goes on, this "* * * condition, once imposed, continues only during the pendency of the producer's application for a permanent certificate." 376 U.S. 515, 84 S.Ct. 861, 866, 11 L.Ed.2d 878, 884. And some of the more sweeping statements made in Catco[38] where reference was made to conditional certificates without indication as to permanent or temporary must now be

[38]360 U.S. 378, 79 S.Ct. 1246, 3 L.Ed2d 1312.

read as conditional *temporary* certificates. For the Court, immediately preceding an extensive quotation from Catco, put its own characterization on the nature of the certificates being dealt with in Catco when it said, "[t]his Court previously discussed the use of the *temporary* certificate procedure in" Catco. (Emphasis supplied.) 376 U.S. 515, 84 S.Ct. 861, 866, 11 L.Ed.2d 878, 884.

[12] The correctness of our holding is demonstrated by the peculiar facts of this record. For applications filed in 1958,[37] the Commission asserts the power to compel the producer to sell gas for nearly ten years[38] at a price substantially less than the opening contract price and without the opportunity of being able to ever seek and obtain the automatic stepped up price increases provided for in the contract. Thus, for nearly half of the twenty-year contract period[39] through the guise of a "price" condition, the

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[37]The Placid and McDermott applications, filed September and December 1958, are typical. There were some as early as April 1957.

[38]The moratorium runs until July 1, 1967, or until any earlier final decision in AR61—2. AR61—2 is still going strong. Its earlier counterpart, the Permian Basin hearing, AR61—1, is pending for decision before the Examiner. The briefs inform us that Chairman Swidler has stated that it will be March of 1965 before 61—1 is decided by the Examiner and the end of 1965 before 61—2 is forthcoming. Oil & Gas Journal 62 (March 16, 1964). A minimum of two years more will be required before they grind through Commission review to land in some Court of Appeals for judicial review. See Wisconsin v. FPC, 1963, 373 U.S. 294, 83 S.Ct. 1266, 10 L.Ed.2d 357; FPC v. Texaco, 1964, 377 U.S. 33, 84 S.Ct. 1105, 12 L.Ed.2d 112, 119, n. 13.

[39]Superior's contract with United covering Bayou Penchant and other leases in Terrebonne Parish and the November 1, 1957, contract between Hassie Hunt Trust and Transco appear to be typical.

Commission obtains an irrevocable dedication[40] of the gas to interstate sale and an effectual denial of any opportunity for the producer to exercise the legislative right to file, subject to suspension and refund, contractual rate increases. If the Commission may do it for half of the period, there is no reason why it may not do so for all. Congress could hardly have intended to delegate the power of legislative repeal by any such easy route.

[13] Actually the Commission's argument for moratorium power harkens back to the like contention made to support exclusion of pertinent economic data discussed in Part II above. Here, as there, it insists that it must have the power to impose a price moratorium because the alternative is either to force a full blown § 4 or § 5 "just and reasonable" rate hearing, which is an unmanageable administrative problem, or exclude the needed gas from the market until such time as such a hearing can be conducted. But as there, we fail to see that it is a case of either or. If the kind of hearing which the particular facts of a particular application require[41] for determination of "public convenience and necessity," it is to be assumed that the Commission will issue a permanent certificate only if the initial contract price is in line or, if out of line, meets the statutory standard of public convenience and necessity. Full protection to the consumer is thereafter accorded so far as subsequent contract rate increases are concerned under the suspension and refund procedures of § 4(e). If, in that

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[40]Since all petitioners have made sales, none is free to withdraw its reserves from dedication. J. M. Huber Corp. v. FPC, 3 Cir., 1956, 236 F.2d 550.

[41]There are no hard and fast rules. Adaptation is the order of the day in this undulating field. See Hill v. FPC, 5 Cir., 1964, 335 F.2d 355 [July 23, 1964].

situation, there might be some further triggering impact, then that would flow from the unique statutory scheme which Congress, not the Commission nor the Courts, are free to change no matter how unsound some might think it to be.

The Commission's brief recognizes that it "is true that in CATCO, Texaco, Inc. v. FPC * * *, Atlantic Refining Co. v. FPC and California Oil Co. v. FPC cited by [certain of the petitioners] the Courts assumed that any rate increases contractually permitted could be filed under Section 4 at any time after operations were commenced under a certificate."[42] But it treats these as judicial aberrations resulting presumably from a failure on the part of the Commission "to meet its hold-the-line obligation by a moratorium condition." This leads the Commission's counsel to claim the necessity for, and the existence of, a power to take whatever action, impose whatever conditions to assure that "excessively high prices are absolutely prevented from being charged." But no matter how commendable that policy may be, the Commission may not supersede § 4 to accomplish it.

IV.

Retroactive Refunds

After fixing the intial price at 18.5¢ per Mcf, the Commission in its conditions also required that the producers

[42]Commission Br. 39. The cases referred to are: Catco, 360 U.S. 378, 79 S.Ct. 1246, 3 L.Ed.2d 1312; Texaco, Inc. v. FPC, 5 Cir., 1961, 290 F.2d 149, 156; Atlantic Refining Co. v. FPC, 1963, 115 U.S. App. D.C. 26, 316 F.2d 677; California Oil Co. v. FPC, 10 Cir., 1963, 315 F.2d 652, 660; see also Willmut Gas & Oil Co. v. FPC, 1961, 111 U.S. App. D.C. 49, 294 F.2d 245.

refund, with interest, the excess over that figure which had been collected under the judicially reversed unconditioned certificates.

[14] The producers make three principal attacks on this refund order. The first one—that the intervenor-distributors should have sought to stay gas deliveries pending determination in the respective Courts of Appeals [43] of their petitions for review—has little merit. Quite apart from any problem of whether intervenor-distributors could have met applicable standards for a stay,[44] the producers' plight was not brought about by the failure of the petitioning intervenors to obtain a stay, but came from the action of the producers in making the deliveries under certificates which, though final were then under direct judicial attack and subject as any competent Power Commission counsel would know, to the possibility of judicial reversal. The risk inherent in making deliveries pending final judicial determination was obvious to the producers. It was up to them to seek interim protective relief from the Commission, and there is no indication that extensions of time or other appropriate relief would have been declined by the Commission.

[15, 16] In the second attack some petitioners[45] apparently contend that the Commission could not order

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[43]See note 6, supra.

[44]The intervenors stress, for example, Virginia Petroleum Jobbers Association v. FPC, 1958, 104 U.S. App. D.C. 106, 259 F.2d 921; Eastern Airlines, Inc. v. CAB, 2 Cir., 1958, 261 F.2d 830; Airport Commission of Forsyth County v. CAB, 4 Cir., 1961, 296 F.2d 95, 96; Associated Securities Corp. v. SEC, 10 Cir., 1960, 283 F.2d 773, 774-775; and Armour & Co. v. Freeman, 1962, 113 U.S. App. D.C. 37, 304 F.2d 404, 406-408, 418.

[45]See, e. g., No. 20989 (Ocean Drilling), No. 20872 (Callery), and No. 20891 (Placid).

refunds because the original unconditioned certificates were not "vacated" or "set aside" by the Courts. Other petitioners urge the opposite—no refund right because certificates were "vacated." The wording of the remand orders vary, those of the Ninth Circuit,[46] Tenth Circuit, [47] and this Circuit[48] spoke in terms of "vacating" or "setting aside," whereas those in the D.C. Circuit[49] and the Third Circuit, following the Supreme Court's mandate,[50] spoke in terms of being remanded for further proceedings. But we agree with the Commission that by the choice of one rather than the other terminology, the remanding Courts intended no distinctive difference in effect.[51]

[17] The third, and serious, attack made by all is that the operative effect of the refund is that of a reparation order.[52] Under the structure of the Act, it has long been recognized, and never questioned, that "* * * under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.'" FPC v.

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[46]283 F.2d 817, at 826.

[47]287 F.2d 159, at 163.

[48]290 F.2d 133, at 138; 290 F.2d 147, at 149.

[49]287 F.2d 146, at 150.

[50]361 U.S. 195, 80 S.Ct. 292, 4 L.Ed.2d 237.

[51]For reasons elucidated in Part II, we reject, however, the further contention of the Commission (Commission Br. 45-47) that "price" was the only issue on the remand.

[52]As we indicated earlier (note 8, supra), Superior was not a party to the refund warning order of January 10, 1962. In our view, the order has no significance one way or the other.

Hope Natural Gas Co., 1944, 320 U.S. 591, 618, 64 S.Ct. 281, 295, 88 L.Ed. 333.[53]

[18] Although, as we point out shortly, these principles call for a special adaptation in the refund order, we think that the petitioners ignore the unusual circumstances of this case. By the remand orders (note 6, supra), all of the Courts of Appeals held that the unconditioned permanent certificates were improperly issued. It is one thing for a Court to rule that under a valid certificate the Commission lacks the power to retrospectively review rates and impose retroactive refund orders. It is quite another for a Court to conclude that a Commission lacking the power to do the former may yet not have inherent power to recapture the fruits obtained under an invalid, that is illegal, order. Thus, under the unique circumstances of this case, refunds are proper.[54]

We have here an unusual situation. On the one hand we hold that producers cannot carry the general principle forbidding reparational orders to the point where it permits them to retain, without question, what was obtained under invalid orders. That means that refunds of excess

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[53]Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 1951, 341 U.S. 246, 71 S.Ct. 692, 95 L.Ed. 912; Panhandle Eastern Pipe Line Co. v. FPC, 3 Cir., 1956, 236 F.2d 289, 292. The Supreme Court in T.I.M.E. v. United States, 1959, 359 U.S. 464, 469-470, 79 S.Ct. 904, 908, 3 L.Ed.2d 952, has recently said of Montana-Dakota: "[I]t was held that the Federal Power Act, which like the Motor Carrier Act expressly declares unreasonable rates to be 'unlawful,' does not create a cause of action for the recovery of allegedly unreasonable past rates. * * *"

[54]In so holding we do not accept the Commission's argument that it has some general powers to protect public rights similar to that of the NLRB in reinstatement and back pay awards in unfair labor practice cases. The propriety of the refund here stands on the peculiar circumstances of this case.

collections are required. But there is no reason why the producers should, in point of time, be required to refund the difference between the amount collected and the conditioned price as soon as it is determined. Refund at that point is not required to serve any public purpose, or reimburse consumers for excess charges. It may, however, impose irreparable loss to the producers. One public interest is, of course, against triggering. But in these five to six years any triggering effect has already taken place, and its impact has been felt. This clock cannot be turned back. As to consumers, they are ultimately entitled to a refund only to the extent that payments made here exceeded a "just and reasonable" rate.

The problem then is to accommodate what we regard to be the inherent power of the Commission to prevent detriment to the consumers to the needs of this case. To balance the two it means that the refunds for collections made during this long period can be determined only after the "just and reasonable" rate is fixed by an appropriate § 4 or § 5 proceeding.

Indeed, it is the operative impact of the policy against reparations, see note 53, supra, which makes this necessary. If the present refund order is affirmed, the producers must repay the difference between the conditioned price and the amount collected. In a § 4 or § 5 rate hearing, it may well, however, turn out the "just and reasonable" rate is determined to be higher than the conditioned price.[55] But if the

[55]We agree with the Commission and the intervenor-distributors that in the § 7 proceedings here ordered, the inquiry on public convenience and necessity is not synonymous with determination of "just and reasonable" rate to be fixed under § 4 or § 5. This forces the conclusion that the conditioned price may well be different from the rate ultimately fixed.

refunds have been made, that would be an empty ruling since there would be neither a legal right nor a practicable means for the producers to recapture that portion of the excessive refunds. Atlantic Seaboard Corp. v. FPC, 4 Cir., 1953, 201 F.2d 568, 572; Sohio Petroleum Co. v. FPC, 10 Cir., 1961, 298 F.2d 465, 467. The result, of course, would be that the consumers during the interim would have had gas at a rate less than "just and reasonable." No consumer is entitled under the statute to that. Nothing in the law should encourage that result or its possibility. And for it to occur means more than an undeserved windfall for favored customers. It means that other rate-payers are absorbing this deficiency and are therefore paying more than they should.

Such an approach is all the more required in view of the action which we take in remanding these cases for yet further hearings. Finding, as we do, significant procedural defects, we cannot sustain the conditioned price of 18.5¢. What the price will be, or whether there will be a price condition, must await the outcome of the further hearings. Refunds at the present time would be premature. At the same time this imposes no impossible administrative burden.[56] When and as the Commission on further hearings

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[56]If, as the Commission contends, our ruling requires a § 7 hearing bordering on a § 4, 5 rate case, there is no reason why the Commission as to these particular cases does not consolidate with the remanded certification proceedings a § 4 or 5 rate case. Consolidation has been ordered before, see, e.g., Texas Eastern Gas & Transmission Co. v. FPC, 5 Cir., 1962, 306 F.2d 345, 349, cert. denied, Manufacturers Light & Heat Co. v. Texas Eastern Transmission Corp., 1963, 375 U.S. 941, 84 S.Ct. 347, 11 L. Ed.2d 273. Where these cases started out with 69 producer applicants, settlements have washed out all except these petitioners. As a precedent, our ruling is something less than the specter supposed,

fixes the conditions, it can prescribe the necessary security to assure that the refunds, when ultimately fixed, will be paid and to or through the proper parties.

We agree that refunds can be required.[57] But to meet the exigencies of this unique case, they must be based, not on the conditioned price when fixed, but on the difference between the price collected and the rate found in a proper proceeding to be the "just and reasonable" one.[58]

V.

The "In-Line" Price Established

[19] The petitioners assert that in arriving at the in-line price of 18.5¢, the Commission improperly excluded many higher, finally certificated prices, failed to give proper weight to prices approved by the Commission's own settle-

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since the Commission, and many others including this Court, look with hope to the day when the area pricing procedure will supply most of the answers. Hunt v. FPC, 5 Cir., 1962, 306 F.2d 334, 343; Hill v. FPC, 5 Cir., 1964, 335 F.2d 355 [July 23 1964]; Wisconsin v. FPC, 1963, 373 U.S. 294, 83 S.Ct. 1266, 10 L.Ed.2d 357.

[57]We think it inappropriate at this time to express any views as to interest or the rate, if interest is to be allowed.

[58]As to Frankel's petition [No. 21028] and Placid's contention as to sales from its well No. 1, Raceland Field, we need only say that, subject to the principles we have discussed as to refunds generally, we agree with the Commission that it is appropriate to require that these producers make whatever refunds are ultimately found to be due for collections made during the time of their respective operations.

As to Superior's petition, except for the Commission allowing a grace period up to August 10, 1959, for sales under one temporary certificate, not here challenged, though similar action was disapproved in Public Service Co. of New York v. FPC, D.C. Cir., 1964, 329 F.2d 242, 250, there appears to be no substantial difference between this record and the others.

ments in similar cases, and failed generally to give proper evaluation to the evidence showing contract prices from which to infer the "in-line" price. This, and the petitioner's related contention, that the evidence demonstrated an in-line price not less than the contract price are matters on which we need not express any view. The remand for further hearing to receive all pertinent evidence, see Part II above, means that these aspects are likewise open for re-hearing and redetermination.[59]

VI.

Take-or-Pay Provisions

[20, 21] In accordance with its earlier decision in Skelly, 1962, 28 FPC 401,[60] the Commission ordered that the take-or-pay provisions in the contracts should be subject prospectively to the Commission's future order in a pending rule-making proceeding, Docket No. R-199 with a provision that producers would not be required to file take-or-pay provisions for less than 80% of the annual contract quantities.

Superior alone contends that for gas not delivered there is no sale, and therefore take-or-pay provisions are beyond the jurisdiction of the Commission under the exclusionary language of § 1(b), 15 U.S.C.A. § 717(b). When viewed realistically in the light of the imperative necessity for long term gas supply commitments, we agree with the Com-

[59]It should be clear that all we say about the "price" itself is equally applicable to the tax reimbursement element.

[60]Public Service Corp. of New York v. FPC, D.C. Cir., 1964, 329 F.2d 242.

mission that this arrangement constitutes a sale within its power of regulation.

Under the peculiarities of this case with service having long ago been commenced and with no suggestion on the part of anyone that they wish to terminate it, we agree with the D.C. Circuit in its holding that this phase of the order does not presently present a reviewable matter. Public Service Corp. of New York v. FPC, D.C. Cir., 1964, 329 F.2d 242, 248; see also Humble Oil & Refining Co. v. FPC, 5 Cir., 1956, 236 F.2d 819, cert. denied, 1957, 352 U.S. 967, 77 S.Ct. 354, 1 L.Ed.2d 321.

The causes are therefore reversed and remanded to the Commission for other and further proceedings consistent with this opinion.

Reversed and remanded.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20872*

CALLERY PROPERTIES, INC., *Petitioner*,
versus
FEDERAL POWER COMMISSION, *Respondent*.

On Petition to Review Orders of the Federal Power Commission

Before RIVES and BROWN, Circuit Judges, and GROOMS, District Judge.

JUDGMENT

This cause came on to be heard on the petitions of Callery Properties, Inc., The Superior Oil Company, Caroline Hunt Sands and Loyd B. Sands, Placid Oil Company, Margaret Hunt Hill, Trustee for Hassie Hunt Trust, J. Ray McDermott & Co., Inc., Ocean Drilling & Exploration Company, and J. R. Frankel, et al., for review of Orders of the Federal Power Commission issued on July 17, 1963 and September 11, 1963, in Docket Nos. G-13183, et al., and was argued by counsel;

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* Judgment also entered in Nos. 20885, 20890, 20891, 20892, 20967, 20989, 21028.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the Orders of the Federal Power Commission in those causes be and the same are hereby reversed; and that these causes be, and they are hereby remanded to the Commission for other and further proceedings consistent with the opinion of this Court.

August 14, 1964

Issued as Mandate:

APPENDIX "B"

The pertinent provisions of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821; as amended by Act of February 7, 1942, c. 49, 56 Stat. 83; 15 U.S.C. 717-717w, are as follows:

Sec. 1. (b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717(b)]

* * *

Sec. 19 (b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court

the record upon which the order complained of was entered, as provided in Sec. 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

Sec. 19 (c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. June 21, 1938, c. 556, § 19, 52 Stat. 831; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub. L. 85-791, § 19, 72 Stat. 947.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

Nos. 714, 768, 769, and 776

OCEAN DRILLING & EXPLORATION COMPANY, J. R. FRANKEL, ET AL., J. RAY MCDERMOTT & CO., INC., THE SUPERIOR OIL COMPANY, *Petitioners*,

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, *Respondents*.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION

QUESTION PRESENTED

Where, prior to completion of appeal proceedings challenging the Federal Power Commission's issuance of a certificate of public convenience and necessity, a natural gas producer commences service under the certificate, which later is held invalid on the ground that the initial price thereunder is out of line, does the Commission, on remand, have power to require refunds of the excess amounts collected by the producer under the invalid certificate?

STATEMENT

By orders issued September 4, 1958 and August 10, 1959, the Federal Power Commission, over the objection of the Public Service Commission of the State of New York and other consumer interests, granted unconditional certificates to a substantial number of natural gas producers, including the four petitioners here, authorizing them to commence the sale of natural gas from Louisiana fields at initial prices ranging from 21.4¢ to 23.8¢ per Mcf. On appeal, the Commission's actions were reversed and the several cases remanded.[1]

In the meantime, however, and notwithstanding the pendency of the appeals, the present petitioners commenced service under the unconditional certificates and collected the high initial price that was the basis for the legal attack on, and judicial invalidation of, the certificates. Following hearings on remand, the Commission determined that the maximum initial price at which these sales should have been certificated was 20¢ per Mcf, including 1.5¢ tax reimbursement where applicable, and, to give effect to this finding, it issued new certificates at that level and directed petitioners to refund all amounts in excess of 20¢ per Mcf which had been collected under the original, judicially invalidated certificates.

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[1] *Public Service Commission of New York* v. *F.P.C.*, 361 U.S. 195 (1959); *United Gas Improvement Co.* v. *F.P.C.*, 283 F. 2d 817 (9th Cir. 1960), *cert. denied*, 365 U.S. 879, 881 (1961); *Public Service Commission of New York* v. *F.P.C.*, 287 F. 2d 146 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 880, 882 (1961); *United Gas Improvement Co.* v. *F.P.C.*, 287 F. 2d 159 (10th Cir. 1961); *United Gas Improvement Co.* v. *F.P.C.*, 290 F. 2d 133 (5th Cir. 1961), *cert. denied*, 368 U.S. 823 (1961); *United Gas Improvement Co.* v. *F.P.C.*, 290 F. 2d 147 (5th Cir. 1961), *cert. denied*, 366 U.S. 965 (1961).

On appeal by petitioners and other producers, the Court of Appeals for the Fifth Circuit, though reversing other aspects of the Commission's order,[2] held that, on remand, the Commission had power to require refunds of "the fruits obtained [by petitioners] under an invalid, that is illegal, order." *Callery Properties, Inc.* v. *F.P.C.*, 335 F.2d 1004 at 1019.

ARGUMENT

Although, for the reasons stated in its own petition for a writ of certiorari (O.T. 1964, No. 678, filed November 12, 1964), the Public Service Commission of the State of New York believes that the decision below urgently requires review and, indeed, summary reversal by this Court, it does not believe that the narrow aspect of the decision below presented by petitioners in Nos. 714, 768, 769, and 776 merits certiorari.

1. The issue raised by petitioners was rightly decided below.

a. The Commission's determination to require refunds of excess amounts was eminently correct, and was, in fact, required by this Court's landmark decision in *Atlantic Refining Co.* v. *Public Service Commission of New York* (*Catco*), 360 U.S. 378 (1959), in which the Commission's unconditional certification of a 21.4¢ Louisiana sale was struck down precisely because it would permit the producers to retain, without refund obligation, an out-of-line price during the "nigh interminable" period between initial certifica-

[2] The court's action in reversing the Commission is the subject of pending petitions for certiorari in *F.P.C.* v. *Callery Properties, Inc.*, O.T. 1964, No. 756; *Public Service Commission of New York* v. *Callery Properties, Inc.*, O.T. 1964, No. 678; *United Gas Improvement Co.* v. *Callery Properties, Inc.*, O.T. 1964, No. 671.

tion and the ultimate conclusion of a rate investigation. Here, where there has been a "nigh interminable" delay of four to five years between initial, invalid certification and lawful certification on remand, the producers nevertheless urge that, as a matter of law, they cannot be required to refund the excess amounts collected during this period. Acceptance of the producer position, however, would result in "a windfall for the natural gas company and a consequent squall for the consumers," 360 U.S. at 390, thereby frustrating the

> "overriding intent of the Congress to give full protective coverage to the consumer as to price." 360 U.S. at 389.

b. Not only are refunds necessary to meet the substantive requirements of the Act, as spelled out by this Court in *Catco, supra,* but they are necessary, as a remedial measure, to carry out the purpose of the reversal of the original, unlawful certificates and to assure that the petitioners in the earlier appeals will be made whole.

c. Wholly aside from the Commission's power on remand to correct the errors laid bare by the earlier appeals, the express conditioning power conferred by Section 7(e) of the Natural Gas Act[3] provides ample authority for the Commission to condition its issuance of the new certificates upon the applicants' refunding all excess amounts collected under the invalid certificates. See *F.P.C.* v. *Hunt,* 376 U.S. 515 at 521 (1964).

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[3] "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

d. In electing to commence service at a time when the validity of their certificates was under attack, the present petitioners necessarily assumed the risk that the certificates might be rendered invalid. See *Virginia Petroleum Jobbers Ass'n* v. *F.P.C.*, 259 F.2d 921 at 927 (D.C. Cir. 1958). The producer contention that the consumer representatives, the successful petitioners in the earlier appeals, either could have or should have obtained a stay of the invalid certificates pending appeal is devoid of merit; no stay was available precisely because those petitioners, if successful, could be made whole through refunds on remand, *Id.*, 259 F.2d at 925-27.

2. There is no conflict between the decision below (insofar as it sustains the Commission's power to order refunds) and the decision of any other circuit or of this Court.

Although petitioners correctly cite *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), and related cases[4] for the proposition that the Commission has no power, under Section 5 of the Act, to require refunds of excess amounts collected under a rate which has assumed finality, they overlook the fact that, as noted by the Commission at the very outset of these remanded proceedings (27 FPC 482 at 483, R. 411):

> "[The] unconditional certificate orders under Section 7 were erroneously issued in the first place and as a result of the invocation of Section 19 have never assumed finality."

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[4] *T.I.M.E.* v. *United States*, 359 U.S. 464 (1959); *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Hope Natural Gas Co.* v. *F.P.C.*, 134 F. 2d 287 (4th Cir. 1943).

Absent finality, of course, the filed-rate doctrine of *Montana-Dakota* has no applicability. See, *e.g., Public Service Commission of New York* v. *F.P.C.*, 329 F.2d 242 at 249 (D.C. Cir. 1964), *cert. denied sub nom. Prado Oil & Gas Co.* v. *F.P.C.*, 377 U.S. 963 (1964);[5] *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, 297 F.2d 561 (8th Cir. 1962), *cert. denied*, 370 U.S. 937; *Cities Service Gas Co.* v. *Columbian Fuel Corp.*, 52 Del. 262, 155 A.2d 879 (1959).

CONCLUSION

In sustaining the Commission's power to order refunds of excess amounts, the decision below was eminently correct and presents no conflict with the decision of any other circuit. Accordingly, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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January 11, 1965

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[5] The arguments now presented by Ocean Drilling, petitioner in No. 714, are virtually identical with the arguments unsuccessfully pressed by Prado Oil & Gas Co. last term. See *Prado Oil & Gas Co.* v. *F.P.C.*, O.T. 1963, No. 987, petition pp. 8-10.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 768

J. R. FRANKEL, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

No. 769

J. RAY MCDERMOTT & CO., INC., PETITIONER

v.

FEDERAL POWER COMMISSION

No. 776

THE SUPERIOR OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

OPINION BELOW

The opinion of the court of appeals (Appendix B to the petition of The United Gas Improvement Company *et al.*, O.T. 1964, No. 671) is reported at 335 F. 2d 1004. The opinions of the Federal Power Commission, Opinions Nos. 398 and 398A, are published at 30 FPC 283 and 682.

JURISDICTION

The judgment of the court of appeals was entered August 14, 1964. Timely petitions for rehearing filed by the present petitioners were denied on September 22, 1964. The petitions for a writ of certiorari were filed on December 17 and 19, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Where a court of appeals has invalidated a Federal Power Commission order granting an unconditioned certificate of convenience and necessity and, on remand, the Commission conditions the certificate so as to require an initial price lower than the applicant's contract price, may the Commission require refunds of excess amounts collected under the original invalid certificate?

2. May the courts rule on the propriety of the Commission's failure to allow a natural gas producer reimbursement of royalty payments allegedly made to the United States for off-shore gas in lieu of taxes,

where the issue was not presented to the Commission and petitioner offered neither allegations nor evidence to support any claim to such reimbursement?

3. Where, pursuant to judicial remand, the Commission, *inter alia*, orders refunds of excess amounts collected for deliveries made under improperly issued unconditioned certificates of convenience and necessity, is a producer entitled to be freed of such refund obligation because it has subsequently transferred the lease of the property from which the deliveries were made?

4. Is delivery of gas under a sales contract rendered exempt from Commission regulation by the fact that payment is made before the purchaser calls for delivery, as permitted by the contract?

STATUTES INVOLVED

Pertinent provisions of Sections 4, 5 and 7 of the Natural Gas Act are set forth in Appendix C (pp. 31a-34a) to the petition of the Public Service Commission of New York, O.T. 1964, No. 678. Sections 1(b) and 19(b) are set forth in Appendix B (pp. 49-50) of the petition of The Superior Oil Company, O.T. 1964, No. 776.

STATEMENT

In these petitions, producers of natural gas seek review of the same court of appeals' decision which is the subject of the pending petitions in *The United Gas Improvement Co., et al.* v. *Callery Properties, Inc.*, O.T. 1964, No. 671; *Public Service Commission of New*

York v. *Callery Properties, Inc.*, O.T. 1964, No. 678; *Ocean Drilling and Exploration Co.* v. *Federal Power Commission*, O.T. 1964, No. 714; and *Federal Power Commission* v. *Callery Properties, Inc.*, O.T. 1964, No. 756. The relevant facts are more fully set forth in our petition in No. 756 and in our memorandum in No. 714. Briefly summarized, the decision below set aside a Power Commissioner order which, under prior judicial remands of unconditioned certificates of convenience and necessity, conditioned the certificates upon the producer-applicants' (1) observing a specified initial price, lower than the contract prices; (2) not filing price increases above a specified triggering level for a stated period of time; and (3) refunding to the pipeline purchasers all amounts previously collected in excess of the initial price determined by the instant order. As to condition (3), the court below sustained the Commission's authority to order refunds in connection with charges collected under the original invalid certificates, but ruled that such refunds should be measured by "just and reasonable" rates to be subsequently determined in rate proceedings, rather than by the initial public convenience and necessity rate determined in the Section 7 certificate proceeding. Petitioners in Nos. 671, 678 and 756 seek review of the court's ruling as to the measure of refunds. Petitioner in No. 714, a producer, seeks review of the court's holding that the Commission has authority to order any refunds at all.

To the extent that further facts are involved in the present petitions, they are set forth below at the appropriate points in the Argument.

ARGUMENT

1. Because of the interrelationship of the two rulings concerning refunds (*i.e.*, the Commission's authority to order refunds and the measure of the refunds), we have acquiesced in the granting of certiorari in No. 714 if the Court grants certiorari as to the refund issue raised in our petition, No. 756, and in Nos. 671 and 678.

The present petitions raise the same refund issue tendered in No. 714. Accordingly, we similarly acquiesce in the granting of the present petitions as to the refund issue if certiorari is granted as to the refund issue in No. 671, 678 and 756.

While we believe that petitioners have not accurately stated the refund question, our acquiescence embraces the substance of the issue presented by the question set forth in the text of the *McDermott* petition (No. 769, p. 2); by questions 1 and 3 of the *Frankel* petition (No. 768, pp. 2-3); and by questions 1, 2 and 3 of the *Superior* petition (No. 776, pp. 2-3).

2. The present petitions seek review of a miscellany of minor questions involving no important issues of principle or of general applicability. None of the issues so tendered warrants this Court's consideration, and the injection of those questions would complicate the litigation to the detriment of resolution of the fundamental questions presented by the pending related petitions.

a. *McDermott (No. 769).*—In a footnote (Pet. p. 2, n. 2), McDermott purports to present or preserve a question as to the Commission's failure to allow it

reimbursement of payments made to the United States in lieu of taxes. This issue was never raised before the Commission; specifically, it was not presented in a petition for rehearing.[1] Accordingly, neither the court below nor this Court would have jurisdiction to consider it. Section 19(b); *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 307; *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 364 U.S. 137, 157-158; *Federal Power Commission* v. *Colorado Interstate Gas Company*, 348 U.S. 492; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 649, 650-651. Nor does the record contain a scintilla of evidence on which a decision of the question could be based.[2]

In any event, the issue sought to be raised is of no general applicability and of no substantial importance either legally or factually.[3]

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[1] The administrative record is not reproduced in its entirety. In the court below the parties designated for printing in the joint appendix those portions of the record they wished. McDermott did not designate its petition for rehearing, nor has it alleged, either in the court below or in its present petition, that it properly presented this issue to the Commission. Should the Court desire, we will provide copies of McDermott's petition for rehearing.

[2] Neither before the Commission, nor in the court below, nor in its present petition has McDermott made any factual allegations tending to support—or even to explain—its contention. See footnote 1, *supra*.

[3] Royalty payments to the United States in lieu of taxes are provided by Section 6 of the Outer Continental Shelf Lands Act, 67 Stat. 466, 43 U.S.C. 1335(a)(9). They are measured

b. *Frankel (No. 768).*[4]—Prior to the Commission order, Frankel, with the approval of the Commission, had transferred the gas producing property covered by the certificate to Continental Oil Company, which thereupon settled its case and has abided by the settlement terms for all deliveries under its certificate since its acquisition of the property. Frankel now seeks to avoid any responsibility for excess charges in connection with the deliveries it made under the improperly issued unconditioned certificate before transferring the property. Manifestly, if the Commission acted properly in ordering refunds for the past period, Frankel must be held responsible for those due for the period of its operations under the certificate. It cannot legally or equitably be permitted to retain moneys improperly collected simply because of a subsequent sale of the producing leases. Even if the point were less clear, the issue presented—involving, as it does, a unique factual situation—would not be of sufficient importance to warrant review by this Court.

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by reference to State severence taxes in effect on August 7, 1953. While the Louisiana tax situation as of that date is unclear, it appears that the maximum amount McDermott might be required to pay the United States under this provision is around 2½ mills per Mcf, which is less than the amount of State taxes, where applicable, which the producers are generally required to absorb by their contracts and by the Commission's order.

[4] J. R. Frankel *et al.*, petitioners, are the stockholders of the corporate successor, in dissolution, of the original certificate applicants. See Petition, p. 3, n. 3. We here refer to the original applicants and the successors as "Frankel," without distinction.

c. *Superior (No. 776).*—Superior's fourth question (Pet. p. 3) involves charges collected by Superior under its improper, unconditioned certificate for gas not delivered until after the collections were made. Superior's contract requires that the purchaser, United Gas Pipe Line Company, periodically purchase and pay for specified minimum quantities; if the purchaser does not take delivery during the specified period, it is entitled to demand that delivery during a subsequent "make-up" period, then paying only the excess, if any, of the legal price at that time over the amount already paid during the contract period.[5]

When, pursuant to judicial remand, the Commission imposed initial price and refund conditions on Superior's certificate, it provided that the amount of gas the purchaser was entitled to receive for the prepayments it had made was to be measured by the proper unit price determined by the Commission rather than by the original contract price. The short of the matter, therefore, is that the Commission has required that any gas sold under the certificate should be delivered and paid for at the Section 7 certificate initial price properly determined by the Commission

[5] The Commission has now pending a rule-making proceeding concerning the proper scope of permissible take-or-pay provisions. Docket No. R-199, 26 Fed. Reg. 4615, May 26, 1961. In the present action, the Commission ordered that the contracts here involved shall be subject to the final action in the rule-making proceeding, subject to a floor on required payments of 80% of the contracted amount. The court below held this action to be not presently reviewable, and nobody has sought review by this Court of that ruling.

as applicable to the deliveries.[6] The court below was manifestly correct in ruling that Superior's collection of the price and later delivery of gas under its contracts constitute "a sale within [the Commission's] power of regulation" (Superior Pet., p. 46). To hold that prepayment removes the delivery of the gas from the coverage of the Act would provide a ready means for evading the law.

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[6] It should be noted that the order does not require cash refunds with interest, as is required in connection with excess collections other than prepayment.

CONCLUSION

If the Court agrees to consider the third question presented by the Commission's petition in No. 756, we acquiesce in the Court's also granting the present petitions to the extent that they bring in issue the Commission's authority to order refunds of excess charges collected under certificates which the courts have since held were improperly issued without initial price conditions. In all other respects the petitions for certiorari should be denied.

Respectfully submitted.

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January 1965.

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No. 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

THE SUPERIOR OIL COMPANY
Petitioner

vs.

FEDERAL POWER COMMISSION,
UNITED GAS PIPE LINE COMPANY
Respondents

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

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LECOMTE, SHREVEPORT, LOUISIANA

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No. 776

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

THE SUPERIOR OIL COMPANY

Petitioner

vs.

FEDERAL POWER COMMISSION,
UNITED GAS PIPE LINE COMPANY

Respondents

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

United Gas Pipe Line Company (United), having moved to be named a respondent in the captioned case, files, subject to said motion, its Brief in Opposition and prays that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered August 14, 1964, be denied.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported as 335 F. 2d 1004 and is printed as Appendix "A" to the petition.

JURISDICTION

Jurisdictional requisites are correctly stated in the petition.

QUESTION PRESENTED

United wishes to confine its participation to the fourth question listed in the petition. Restated that question is as follows:

> Was there a sale of gas within the meaning of Section 1(b) of the Natural Gas Act, when, in obedience to the requirements of a contract covering the sale of gas to United for resale in interstate commerce, United paid for gas it is then unable to receive into its system, but which United has the right to receive at a later date?

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, Section 1(b), 15 U.S.C. 717(b), is set out in Appendix "B" to the petition.

STATEMENT OF THE CASE

Petitioner, The Superior Oil Company (Superior), is a producer of natural gas; United is a transmission company engaged in the purchasing of natural gas which it transmits through pipelines and resells for ultimate public consumption. By contract Superior agreed to sell, and United agreed to buy for a period of twenty years and in the usual conduct of its business, gas produced by Superior from certain fields in South Louisiana. The contract provided that United would pay for, whether taken or not, a minimum quantity of gas in each contract year and that any deficiency in takings could be made up in a subsequent contract year after the required minimum had been taken.

Superior filed the contract with the Federal Power Commission (Commission) as an effective rate schedule, and it sought and obtained a certificate authorizing the sale. The Commission's order, issued August 10, 1959, granting the certificate without condition was vacated upon review and remanded.(1) In the interval between issuance of the certificate and the remand by the court service was initiated and United paid Superior for required annual minimum quantities of gas which quantities exceeded the volumes United was able to take into its system.

In its Opinion 398,(2) issued in the remanded proceeding, the Commission granted Superior a certificate

(1) *United Gas Improvement Co. v. Federal Power Commission*, 283 F. 2d 817 (9 Cir. 1960).

(2) 30 F.P.C. 283 (R. 549).

conditioned at an initial price lower than that contained in the contract and ordered Superior to refund the difference between the contract price paid and the lower price. This refund obligation extended both to gas paid for and delivered, and that paid for but not delivered.

In its application for rehearing Superior contended that payments made for gas not delivered were beyond the Commission's jurisdiction to regulate, asserting the gas so paid for had not been sold within the meaning of Section 1(b) of the Act

In its Opinion 398-A,[3] denying rehearing, the Commission rejected Superior's argument and ruled that, while, held for future delivery, the gas so paid for had been sold within the meaning of Section 1(b), and that the price paid was within its jurisdiction to regulate. The Fifth Circuit affirmed.

REASONS FOR DENYING THE WRIT

Sustaining Superior's argument would place outside the Commission's regulatory control a substantial amount of the price paid by United to Superior for gas bought under a conventional gas purchase contract and resold by United in interstate commerce. These payments were made in obedience to contractual provisions requiring United annually to pay for a minimum quantity of gas, but which also provided that the payments could be recouped in future years by accepting deliveries of gas in excess of the required, annual, minimum quantities.

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(3) 30 F.P.C. 682 (R. 606).

On the record made, the contractually provided make-up periods had not expired and Superior's contractual obligation to deliver the gas previously paid for remained extant.(4) Sustaining Superior's argument would reward its advantageous bargaining position by defeating the Commission's jurisdiction over the price currently paid for gas but held by Superior for future delivery.

Basically Superior's argument is that the Commission and the reviewing court misinterpreted the contract provisions. Superior says that, correctly interpreted, the contract provided that the payments made by United were "damages" for breach of contract and not payments for gas, and that payment of damages for breach of contract cannot be a sale of gas within Section 1(b) of the Act. But factually the contract contains no such provisions, and the Commission and the lower court declined to read such a legal effect into the clearly worded contract provisions. The most that can be said for Superior's argument is that Superior has sought to frame a mixed question of fact and law which, it says, was incorrectly decided below. Superior's plea for a different interpretation of the contract was rejected by both the Commission and the reviewing court, and it does not present a question of sufficient importance to warrant the intervention of this Court.

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(4) Since the record was made, the contractually provided make-up periods have been extended and much of the gas previously paid for has been delivered. Moreover, it is United's view that Superior may not be relieved of the duty to deliver gas so paid for without abandonment authorization granted under Section 7(b) of the Act.

Moreover, Superior's reliance on the contract terms presents Superior with a basic inconsistency in its argument. The contract on which it relies clearly binds Superior to deliver to United gas for these prepayments, after United has taken the required minimums in future years. Superior was unable to explain away this inconsistency in its arguments made below, and it omits any reference of this contractual obligation in the petition to this Court.

Contrary to Superior's contention, the holding is not in conflict with *Marr v. Federal Power Commission*, (Fifth Circuit 1964) 336 F. 2d 320. (5) There the Court held an assignment of oil and gas leases not to be within the Commission's jurisdiction. In *Marr* the parties resisted the Commission's effort to compel them to apply for a certificate authorizing the transaction. Differing from the situation in *Marr*, this proceeding involves issuance of the certificate of public convenience and necessity sought by Superior authorizing the transaction. Absent such a certificate the transaction could not be accomplished, Superior could deliver no gas under the contract, and it could demand no payments under the contract. This case involves the sale of gas by a producer to a pipeline under a conventional gas sales contract and is clearly distinguishable from *Marr* which involved an assignment of leases.

The holding affirmed below was that in annually paying for the contractually required minimum quantity of gas, United paid for gas, whether it was then delivered

(5) *Marr* and the instant case were decided by the same panel in opinions issued eleven days apart.

or held by Superior for future delivery; and that Superior sold the gas so paid for, including the portion held for future delivery, within the meaning of Section 1(b) of the Act. This holding comes within the accepted definitions of sales and nothing contained in the Act suggests that the sales included in Section 1(b) are restricted to those instances where the gas is physically delivered simultaneously with the act of payment. The holding is entirely consistent with the contractual agreement of the parties and defeats Superior's effort to carve out a gap in the Commission's jurisdiction, which gap could be seized on to defeat regulation over the price paid producers for very substantial quantities of gas purchased by pipelines in the normal course of their business for resale in interstate commerce. It defeats Superior's efforts to achieve a higher price for its gas than that which is just and reasonable, and it thus avoids an unfair burden on the consuming public. Finally, the holding permits the Commission to exercise its certificate authority over the flow of all gas sold in interstate commerce for resale, and it permits the Commission to avoid any future claim by Superior that, because of expiration of the contractually provided make-up period, it can lawfully refuse to deliver gas previously paid for but held for future delivery.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Superior's petition for writ of certiorari should

be denied insofar as it raises issues with respect to the Commission's jurisdiction to regulate the price paid for gas held for future delivery.

Respectfully submitted,

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